SUPREME COURT, U. S.

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APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, PETITIONER,

v.

NEIFERT-WHITE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1967
GRANTED OCTOBER 9, 1967

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER,

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NEIFERT-WHITE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

v.

NEIFERT-WHITE CO., a Corporation, Defendant.

RELEVANT DOCKET ENTRIES

2/5/65	Complaint filed.
2/24/65	Defendant's motion to dismiss.
3/5/65	Order denying motion to dismiss.
3/23/65	Answer filed.
9/27/65	Defendant's motion for judgment on the pleadings.
12/6/65	District Court's opinion, order, and judgment.
1/20/67	Opinion and judgment of the Court of Appeals.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

Civil No. 1229

UNITED STATES OF AMERICA, Plaintiff,

v.

NEIFERT-WHITE Co., Corporation, Defendant.

COMPLAINT

Plaintiff complains and alleges as follows:

First Cause of Action

I

That this is a suit of a civil nature brought by the United States of America through its Attorney General, acting by Moody Brickett, United States Attorney for the District of Montana, wherein jurisdiction is invoked and relief is sought under the provisions of the False Claims Act, 31 U.S.C. §§231 and 232, et. seq.

II

That at all times herein mentioned, the defendant, Neifert-White Co., was a Montana Corporation with its principal place of business in Townsend, Montana.

III

That at all times herein mentioned H. G. White was the executive vice-president of said corporation acting as a duly authorized agent of said corporation.

IV

That at all times herein mentioned qualified borrowers were eligible to obtain from plaintiff to finance the purchase of grain storage bins, loans not to exceed 80% of the actual

purchase price paid by said borrowers for said bins through plaintiff's Farm Storage Facility Loan Program existing pursuant to Section 4(h) of the Commodity Credit Corporation Charter Act, 7 U.S.C. §714b(h).

V

That during July of 1959 Elizabeth M. Foster of East Helena, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $650 each; that upon such purchase the defendant undertook to assist Elizabeth M. Foster in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of one of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency tor loan applications under said program, defendant's invoice of said sale dated July 22, 1959, which falsely indicated thereon that the actual purchase price to be paid by Elizabeth M. Foster for each of said bins was $725, that said false invoice was prepared, issued and utilized by defendant, acting through said H. G. White, with the intent and for the purpose of fraudulently inducing plaintiff to advance to Elizabeth M. Foster a loan in the amount of $580 in violation of the provisions of said program when she was, in fact, then and there lawfully entitled and qualified to borrow only $520 thereunder for such purpose as defendant well knew.

VI

That because of defendant's preparation, issuance and utilization of said false and fradulent invoice in connection with the purchase and loan application of Elizabeth M. Foster as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Elizabeth M. Foster the amount of $580 which exceeded by $60 the amount of $520 she was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Second Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 Harold R. Myles of East Helena, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $650; that upon such purchase the defendant undertook to assist Harold R. Myles in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 16, 1959, which falsely indicated thereon that the actual purchase price to be paid by Harold R. Myles for said bin was $698; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Harold R. Myles a loan in the amount of $558.40 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $520 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Harold R. Myles as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Harold R. Myles the amount of $558.40 which exceeded by $38.40 the amount of $520 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Third Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 John C. Walter of Townsend, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $629; that upon such purchase the defendant undertook to assist John C. Walter in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 14, 1959, which falsely indicated thereon that the actual purchase price to be paid by John C. Walter for said bin was $725; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to John C. Walter a loan in the amount of $578.40 in violation of the provisions of said program when he was in fact, then and there lawfully entitled and qualified to borrow only $503.20 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of John C. Walter as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to John C. Walter the amount of $578.40 which exceeded by $75.20 the amount of $503.20 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Fourth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 George Dundas of Tosten, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $664; that upon such purchase the defendant undertook to assist George Dundas in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 3, 1959, which falsely indicated thereon that the actual purchase price to be paid by George Dundas for said bin was $762; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to George Dundas a loan in the amount of $609.60 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $531.20 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of George Dundas as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to George Dundas the amount of $609.60 which exceeded by $78.40 the amount of $531.20 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Fifth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First cause of Action.

II

That during July of 1959 D. L. Holloway of Townsend, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $2175.00; that upon such purchase the defendant undertook to assist D. L. Holloway in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 20, 1959, which falsely indicated thereon that the actual purchase price to be paid by D. L. Holloway for said bins was $2632.50; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to D. L. Holloway a loan in the amount of $2106.00 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $1820.00 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of D. L. Holloway as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to D. L. Holloway the amount of $2106.00 which exceeded by $286 the amount of $1820.00 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Sixth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 Ruth McConnell of Waverly, Illinois, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $2175; that upon such purchase the defendant undertook to assist Ruth McConnell in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about September 18, 1959, which falsely indicated thereon that the actual purchase price to be paid by Ruth McConnell for said bins was $2632.50; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Ruth McConnell a loan in the amount of $2106 in violation of the provisions of said program when she was, in fact, then and there lawfully entitled and qualified to borrow only $1740 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Ruth McConnell as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Ruth McConnell the amount of $2106 which exceeded by $366 the amount of $1740 she was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Seventh Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 V. R. Cazier & Sons of Tosten, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $2640; that upon such purchase the defendant undertook to assist V. R. Cazier & Sons in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 24, 1959, which falsely indicated theron that the actual purchase price to be paid by V. R. Cazier & Sons for said bins was $2979; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to V. R. Cazier & Sons a loan in the amount of $2383 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $2112 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of V. R. Cazier & Sons as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to V. R. Cazier & Sons the amount of $2383 which exceeded by $271 the amount of $2112 they were then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Eighth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Charles P. Ruth of Townsend, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $1450; that upon such purchase the defendant undertook to assist Charles P. Ruth in obtaining from plaintiff undersaid program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 7, 1959, which falsely indicated thereon that the actual purchase price to be paid by Charles P. Ruth for said bins was $1700; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Charles P. Ruth a loan in the amount of $1360 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $1160 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Charles P. Ruth as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Charles P. Ruth the amount of $1360 which exceeded by $200 the amount of $1160 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Ninth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 James E. Miller of Tosten, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $1950; that upon such purchase the defendant undertook to assist James E. Miller in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program defendant's invoice of said sale dated on or about August 15, 1959, which falsely indicated thereon that the actual purchase price to be paid by James E. Miller for said bins was $2175; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to James E. Miller a loan in the amount of $1740 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $1560 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of James E. Miller as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to James E. Miller the amount of $1740 which exceeded by $180 the amount of $1560 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Tenth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Jack C. Nelson of Townsend, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $1950, that upon such purchase the defendant undertook to assist Jack C. Nelson in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 1, 1959, which falsely indicated thereon that the actual purchase price to be paid by Jack C. Nelson for said bins was $2175; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Jack C. Nelson a loan in the amount of $1740 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $1560 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Jack C. Nelson as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Jack C. Nelson the amount of $1740 which exceeded by $180 the amount of $1560 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Eleventh Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Wm. R. and Robert H. Kimpton of Toston, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $1300; that upon such purchase the defendant undertook to assist Kimptons in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 13, 1959, which falsely indicated thereon that the actual purchase price to be paid by Wm. R. and Robert H. Kimpton for said bins was $1450; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Wm. R. and Robert H. Kimpton a loan in the amount of $1160 in violation of the provisions of said program when they were, in fact, then and there lawfully entitled and qualified to borrow only $1040 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Wm. R. and Robert H. Kimpton aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Wm. R. and Robert H. Kimpton the amount of $1160 which exceeded by $120 the amount of $1040 they were then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Twelfth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during September of 1959 Don F. Scoffield of Three Forks, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of $750; that upon such purchase the defendant undertook to assist Don F. Scoffield in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about September 18, 1959, which falsely indicated thereon that the actual purchase price to be paid by Don F. Scoffield for said bin was $850; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Don F. Scoffield a loan in the amount of $680 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only $600 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Don P. Scoffield as aforesaid, and not otherwise, plaintiff, though its aforesaid agency, was induced by loan and did loan to Don F. Scoffield the amount of $680 which exceeded by $80 the amount of $600 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

WHEREFORE, plaintiff prays for judgement against defendant as follows:

1. For the statutory forfeiture penalty of $2000 each on plaintiff's causes of action One through Twelve;
2. For plaintiff's costs of suit; and,
3. For such other and further relief as is just and proper.

Dated this 4th day of February, 1965.

Moody Brickett, United States Attorney for the District of Montana. Clifford E. Schleusner, Assistant United States Attorney for the District of Montana, Attorneys for Plaintiff. Address: Federal Building, Billings, Montana.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

Civil Action File No. 1229

UNITED STATES OF AMERICA, Plaintiff,

vs.

NEIFERT-WHITE Co., a Corporation, Defendant.

MOTION TO DISMISS

Comes now the defendant, Neifert-White Co., a corporation, by its attorney and moves the Court as follows:

I

To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

II

To dismiss the action because the eleven several causes of action each fails to state a claim against this defendant upon which relief can be granted.

Dated this 23rd day of February, 1965.

Patrick F. Hooks, 218 Broadway, Townsend, Montana, Attorney for Defendant, Neifert-White Co., a Corporation.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

vs.

NEIFERT-WHITE CO., a Corporation, Defendant.

ORDER

The defendant's Motion to Dismiss having been filed herein on the 24th day of February, 1965, and said motion not having been supported by a brief filed in accordance with the provisions of Rule 7 of the Rules of this Court,

IT IS THEREFORE ORDERED and this does order that the said Motion to Dismiss be and the same hereby is denied, and the defendant is granted 20 days within which to further plead.

Done and dated this 5th day of March, 1965.

W. D. Murray, United States District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

vs.

NEIFERT-WHITE Co., a corporation, Defendant.

ANSWER

Defendant for answer to plaintiff's complaint, admits, denies and alleges:

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted in any or all of the twelve several causes of action.

Second Defense

First Cause of Action

I

Defendant admits each and all of the allegations contained in paragraphs I, II, III, and IV of the first cause of action and likewise admits the allegations of said paragraphs as the same are realleged by reference in paragraph I of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Cause of Action.

II

Answering paragraph V of the first cause of action, defendant admits that at or about the time alleged in the complaint, Elizabeth M. Foster did purchase two grain storage bins from the defendant in Townsend, Montana; Admits the defendant gave to Elizabeth M. Foster an invoice, receipt or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph V;

III

Answering paragraph VI of the first cause of action, defendant denies the allegations therein contained.

Second Cause of Action

I

Answering paragraph II of the second cause of action, defendant admits that at or about the time set forth in the complaint, Harold R. Myles bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to Harold R. Myles an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the second cause of action, the defendant denies each and all of the allegations therein contained.

Third Cause of Action

I

Answering paragraph II of the third cause of action, defendant admits that at or about the time set forth in the complaint, John C. Walter bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to John C. Walter an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the third cause of action, the defendant denies each and all of the allegations therein contained.

Fourth Cause of Action

I

Answering paragraph II of the fourth cause of action, defendant admits that at or about the time set forth in the complaint, George Dundas bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to George Dundas an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the fourth cause of action, the defendant denies each and all of the allegations therein contained.

Fifth Cause of Action

I

Answering paragraph II of the fifth cause of action, defendant admits that at or about the time set forth in the complaint, D. L. Holloway bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to D. L. Holloway an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the fifth cause of action, the defendant denies each and all of the allegations therein contained.

Sixth Cause of Action

I

Answering paragraph II of the sixth cause of action, defendant admits that at or about the time set forth in the complaint, Ruth McConnell bought three grain storage bins from the defendant in Townsend, Montana; Admits

that defendant gave to Ruth McConnell an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the sixth cause of action, the defendant denies each and all of the allegations therein contained.

Seventh Cause of Action

I

Answering paragraph II of the seventh cause of action, defendant admits that at or about the time set forth in the complaint, V. R. Cazier & Sons bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to V. R. Cazier & Sons an invoice, bill of sale or other sales slip evidencing said sales; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the seventh cause of action, the defendant denies each and all of the allegations therein contained.

Eighth Cause of Action

I

Answering paragraph II of the eighth cause of action, defendant admits that at or about the time set forth in the complaint, Charles P. Huth bought two grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to Charles P. Huth an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the eighth cause of action, the defendant denies each and all of the allegations therein contained.

Ninth Cause of Action

I

Answering paragraph II of the ninth cause of action, defendant admits that at or about the time set forth in the complaint, James E. Miller bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to James E. Miller an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the ninth cause of action, the defendant denies each and all of the allegations therein contained.

Tenth Cause of Action

I

Answering paragraph II of the tenth cause of action, defendant admits that at or about the time set forth in the complaint, Jack C. Nelson bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to Jack C. Nelson an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the tenth cause of action, the defendant denies each and all of the allegations therein contained.

Eleventh Cause of Action

I

Answering paragraph II of the eleventh cause of action, defendant admits that at or about the time set forth in the complaints, Wm. R. and Robert H. Kimpton bought two grain storage bins from the defendant in Townsend,

Montana; Admits that defendant gave to Wm. R. and Robert H. Kimpton an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the eleventh cause of action, the defendant denies each and all of the allegations therein contained.

Twelfth Cause of Action

I

Answering paragraph II of the twelfth cause of action, defendant admits that at or about the time set forth in the complaint, Don F. Scoffield bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to Don F. Scoffield an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the twelfth cause of action, the defendant denies each and all of the allegations therein contained.

III

Defendant denies each and every allegation, matter and thing contained in the twelve several causes of action which is not hereinabove specifically admitted, denied or otherwise qualified.

WHEREFORE, having fully answered, defendant prays that the complaint be dismissed, that defendant have judgment for his costs and for such other and further relief as is just and proper.

Dated this 21st day of March, 1965.

s/Patrick F. Hooks, 218 Broadway, Townsend, Montana, Attorney for Defendant, Neifert-White Co.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

Civil Action No. 1229

UNITED STATES OF AMERICA, Plaintiff

vs.

NEIFERT-WHITE Co., a corporation, Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now NEIFERT-WHITE Co., a corporation, the defendant above-named, and moves the Court to enter judgment on the pleadings in favor of defendant herein on the ground that defendant is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

Dated this 24th day of September, 1965.

Patrick F. Hooks, Office and Post Office Address: 218 Broadway, Townsend, Montana. Hughes and Bennett. By Michael J. Hughes, Office and Post Office Address: 11 Edwards Street, P. O. Box 1166, Helena, Montana, Attorneys for Defendant.

Filed December 6, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

OPINION AND ORDER No. 1229

UNITED STATES OF AMERICA, Plaintiff

v.

NEIFERT-WHITE CO., a corporation, Defendant

OPINION AND ORDER OF THE DISTRICT COURT

This is a civil action brought by the government under the provisions of the False Claims Act, 31 U.S.C. § 231 et seq. to recover the penalties provided by that Act. Jurisdiction of the action is expressly conferred on this court by 31 U.S.C. § 232(A).

Section 231 of Title 31 provides in pertinent part as follows:

> "Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claims to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit, and such forfeiture and damages shall be sued for in the same suit."

The complaint alleges that at all times pertinent to the action there existed, pursuant to Section 4(h) of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714(b)(h), the government's Farm Storage Facility Loan Program under which qualified borrowers were eligible to obtain from the government to finance the purchase of grain storage bins, loans of not to exceed 80% of the actual purchase price paid by the borrower for said bins. The complaint contains 12 causes of action in each of which it is charged with respect to a different borrower under the program that the defendant, a dealer in grain storage bins, assisted the respective borrowers to obtain loans in excess of 80% of the purchase price actually paid for the grain storage bins purchased by furnishing false invoices which showed the purchase price of the respective bins purchased to be greater than the purchase price actually paid. As an example, in the First Cause of Action, it is alleged that the actual price for which the bins were sold to a named borrower was $650 each, on which, under the program, the borrower would have been entitled to a loan of only $520 each, but that defendant furnished an invoice showing the price paid for the bins was $725 each, and thereby the borrower obtained loans of $580 on each bin. The remaining causes of action contain similar allegations with respect to different borrowers. The government concedes that there was no default on any of the loans and that it suffered no damage, and seeks only the penalty provided by the Act on each count.

Defendant filed an answer in which the First Defense to each cause of action was that the complaint failed to state a claim upon which relief can be granted, and thereafter moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. At the time of pretrial conference the motion for judgment on the pleadings was heard and briefs in support of and in opposition to the motion were submitted, and the motion was taken under advisement.

Preliminarily it should be noted that the motion is timely since it was made after the pleadings were closed and within such time as not to delay the trial of the action, as required by Rule 12(c).

Defendant's position on the motion is that the loan applications by the various borrowers, which were supported by the allegedly false invoices furnished by defendant, are not false claims against the government within the meaning of the False Claims Statute, 31 U.S.C. § 231. After considering the briefs of the parties and the authorities cited therein, the court is of the opinion that the defendant's position is correct.

At the outset it should be pointed out that the False Claims Act was not designed to reach every fraud practiced upon the government. As the Court of Appeals for the Ninth Circuit stated in *United States* v. *Howell,* 318 F. 2d 162 (1963) at page 165:

> "If the (False Claims) Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent. The Supreme Court of the United States has made it clear that the 'False Claims Act was not designed to reach every kind of fraud practiced on the Government.' *United States* v. *McNinch, supra,* 356 U.S., at 599, 78 S. Ct. at 953, 2 L. Ed 1001. See also *United States* v. *Cochran, supra,* 235 F. 2d at 131–134."

In *United States* v. *Cohn,* 270 U.S. 339, at 345–346 (1926) the Supreme Court defined what is a claim within the meaning of the False Claims Act in the following words:

> "While the word 'claim' may sometimes be used in the broad juridical sense of a 'a demand for some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,'' *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property *to which a right is asserted against the Government, based upon the Government's own liability to the claimant.''* [Emphasis supplied.]

In *United States* v. *McNinch*, 356 U.S. 595 (1958) the Supreme Court found the above quoted 1926 definition still relevant in determining what is a claim within the meaning of the False Claims Act. This definition has also been adopted and applied in the Ninth Circuit in *United States* v. *Howell, supra*, and in the Third Circuit in *United States* v. *Tieger*, 234 F. 2d 589 (1956).

Applying the above definition of a "claim" to the facts alleged in the complaint in the instant case, it immediately becomes apparent that the loan applications presented to the government by the borrowers, supported by the false invoices furnished by defendant were not "claims for money or property to which a *right* was asserted against the Government based on the Government's own liability" to the borrowers, because the Government was under no liability to those borrowers. The loan applications herein involved were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money.

In 54 C.J.S. "Loans", p. 654, it is stated

> "*A loan of money has been defined as a contract* by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows * * * A loan of money is something more than the mere delivery of money by the owner to another. In order to *constitute a loan there must be a contract* whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use."

Viewing a loan as a contract, an application for a loan is an invitation to enter a contract. In *United States* v. *Tieger*, 234 F. 2d 589 (1956) the Court of Appeals for the Third Circuit noted at 591,

> "But this privilege of contracting certainly is not a claim in normal business or legal usage and terminology."

And in footnote 7 in the *Tieger* case on 591, the court observed

> "'The 'claim' must be presented for 'payment or approval.'" This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter a contract."

The decisions in *United States* v. *Tieger, supra,* which incidentally was approved by the Supreme Court in *United States* v. *McNinch, supra,* and *United States* v. *Veneziale,* 268 Fed. 504 (1959), both decided in the Third Circuit, are illustrative of the proposition that in order for there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability to the claimant. Both cases involved false statements made to the Government by the defendants, through private lending institutions, for the purpose of obtaining home improvement loans which were subsequently insured by the Government under Title I of the Federal Housing Act. In the *Tieger* case, the loans were subsequently repaid by the borrowers and no claim against the Government under its loan insurance ever resulted. The Third Circuit held that no offense under the False Claims Act was established, even though false statements resulted in the Government issuing insurance on the loans, because no claim was made against the Government based on its own liability. On the other hand, in the *Veneziale* case, the borrowers defaulted on the loans, and the lending institutions made a claim against the Government for repayment of the loans based on the loan insurance which it had issued as a result of the false statements presented to it. In this case the court found an offense under the False Claims Act because the Government found itself faced with an enforceable demand for money based upon its liability under the loan insurance which it had been fraudulently induced to issue.

In this case, the loan applications, even though supported by false invoices, did not constitute an enforceable demand for money on the Government based on any liability of the Government to the borrowers.

In opposition to the motion the Government relies on the cases of *Rainwater* v. *United States,* 356 U.S. 590 and the cases of *Toepleman* v. *United States, United States* v. *Cato* and *United States* v. *McNinch,* decided in a joint opinion at 242 F. 2d 359 and 356 U.S. 595. In the *Rainwater* case the only question presented and decided was whether a claim against Commodity Credit Corporation was a claim against the United States within the meaning of the False Claims Act. The Supreme Court decided that it was. No question was raised or decided in that case as to what constitutes a claim within the meaning of the Act. The same is also true of the *Cato* and *Toepleman* cases. With reference to those cases the Supreme Court said at 356 U.S. 596 "The Court of Appeals reversed on the ground that a false claim against Commodity was not a claim 'against the Government of the United States, or any department or officer thereof' within the meaning of that Act. The sole question before us so far as these two actions are concerned, is whether the Court of Appeals erred in so deciding. For the reasons set forth in *Rainwater* we hold that it did." Therefore, it is obvious that the *Rainwater, Cato* and *Toepleman* cases are no authority for the Government's position here.

The *McNinch* case is directly against the Government's position, and supports the views hereinbefore expressed. In that case at 356 U.S. 599, the Supreme Court said:

> "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government. From the language of that Act, read as a whole in the light of normal usage, and the available legislative history, we are led to the conclusion that an application for credit insurance does not fairly come within the scope that Congress intended the Act to have."

The Government also relies on *United States* v. *Cherokee Implement Company,* 216 F. Supp. 374. In that case the court stated:

> "In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. 231."

The cases referred to are *McNinch, Rainwater* and *Veneziale, supra* and *Smith* v. *United States,* 287 F. 2d 299; *United States* v. *Brown,* 274 F. 2d 107 and *United States* v. *Globe Remodeling Co., Inc.,* 196 F. Supp. 652. None of the cases involved moneys paid out as a result of an application for a loan except *Rainwater,* and as pointed out above the question of whether an application for a loan is a claim was neither raised or decided. *McNinch* involved, as above indicated, an application for credit insurance and it was there decided that a false application for credit insurance was not a false claim within the meaning of the Act. *Veneziale,* as pointed out above, involved a claim under the government's liability on credit insurance it had been fraudulently induced to issue *Smith* v. *United States* involved the submission of false quarterly reports from which rentals to be paid under a lease from the Federal Government were to be determined. *United States* v. *Brown* involved false claims for support prices on tobacco. *United States* v. *Globe Remodeling Co.,* like *Veneziale,* involved a false claim against the Government on its liability on credit insurance it had fraudulently been induced to issue under the Federal Housing Act. For these reasons the court does not find the *Cherokee Implement Co.* case convincing.

THEREFORE, IT IS ORDERED and this does order that the defendant's motion for judgment on the pleadings be and the same is hereby granted, and each cause of action, and the complaint and the action is hereby ordered dismissed on the ground that neither the complaint nor any of its causes of action states a claim for relief under the provisions of 31 U.S.C., Section 231.

Done and dated this 3rd day of December, 1965.

W. D. Murray, United States District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

Civil Action File No. 1229

UNITED STATES OF AMERICA, Plaintiff

vs.

NEIFERT-WHITE Co., a corporation, Defendant

JUDGMENT

This action came on for hearing on Defendant's Motion for Judgment on the Pleadings before the Court, Honorable W. D. Murray, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Orderd and Adjudged that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Causes of Action, and the Complaint, and the action be dismissed on the ground that neither the complaint nor any of its causes of action state a claim for relief under the provisions of 31 U.S.C., Sec 231.

Dated at Butte, Montana—this 6th of December, 1965.

/s/ John J. Parker, Clerk of Court.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,945

UNITED STATES OF AMERICA, Appellant,

vs.

NEIFERT-WHITE CO., a corporation, Appellee.

[January 20, 1967]

Appeal from the United States District Court for the District of Montana

Before: CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against Neifert-White Company, based upon the civil provisions of the False Claims Act (Act), R.S. §§ 3490 and 5438 (1875), 31 U.S.C. § 231 (1964).[1] Defendant answered and moved

[1] The statute, as set forth in 31 U.S.C. § 231, reads in part as follows:

> "Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

In bringing this action under the False Claims Act, based upon the transactions described above, the Government did not assert that it had sustained any damages. Accordingly, the Government sought recovery only of the $2,000 statutory penalty for each of twelve alleged violations, as authorized by section 231, aggregating $24,000.

for judgment on the pleadings. The district court granted the motion and entered a judgment dismissing the action. *United States* v. *Neifert-White Company*, D.C. Mont., 247 F.Supp. 878. The Government appeals.

The facts of this case are not in dispute. Neifert-White is in the business of selling grain storage bins to farmers in Montana. Under the government Farm Storage Facility Loan Program, any grain grower purchasing grain storage bins could make application to borrow from the Commodity Credit Corporation (C.C.C.) an amount not to exceed eighty percent of the actual purchase price of these bins.[2]

Each applicant was required to submit a loan application to the local Agricultural Stabilization and Conservation Committee, accompanied by an invoice for the actual cost of the grain storage bins. During 1959 Neifert-White sold grain storage bins to twelve growers and assisted each of them in obtaining a loan from the C.C.C. An officer of Neifert-White prepared false invoices which overstated the sales price of the storage bins sold, enabling the purchasers to qualify for larger loans. Relying upon these false invoices, the C.C.C. approved loans to the twelve applicants in excess of eighty percent of the bins' actual purchase price.

The district court granted Neifert-White's motion for judgment on the pleadings on the ground that the loan applications to the C.C.C. were not "claims" within the meaning of the Act. The court reasoned that the loan applications ". . . were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money." 247 F.Supp. at 881. Such applications, the court held, were no more than unenforceable invitations to enter into loan contracts.

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[2] This program existed pursuant to the provisions of Section 4(h) of the Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948), as amended, 15 U.S.C. § 714b(h) (1964), and is administered pursuant to that agency's Farm Storage Facilities regulations, 7 CFR § 1474.721-.769.

The Government concedes that there was no legal obligation on the part of the United States to approve the grain growers' applications for such loans. It argues, in effect, however, that where an application to the Government is for the purpose of obtaining the disbursement or transfer of federal funds or property, it constitutes a "claim" within the meaning of the Act, even though the applicant does not assert an enforceable legal right to such disbursement or transfer. There is no question that these applications were for the disbursement of federal money.

The meaning which the Government would give to the statutory term "claim," is contrary to that expressed in *United States* v. *Cohn,* 270 U.S. 339, involving a criminal prosecution for a violation of the Act. The Supreme Court there made it clear that a "claim" under that Act involves two elements, both of which must be present, namely: (1) an effort to obtain a disbursement or transfer of federal funds or property, (2) to which funds or property a right is asserted against the Government, based upon the Government's own liability to the claimant.[3] The second of these two elements is lacking in our case.

The Government argues that the pronouncement in *Cohn,* that a claim against the Government relates to money or property to which a right is asserted against the Government is dictum and should be disregarded. In support of this view, the Government contends that, in *Cohn,* the Supreme Court held for the defendant on the ground that since

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[3] The Court there stated:

> "While the word 'claim' may sometimes be used in the broad juridical sense of a 'demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg v. Pennsylvania,* 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." (270 U.S. at 345-346.)

the property the defendant sought to obtain was duty-free merchandise in the possession of the collector of customs, there had been no effort to obtain any funds or property belonging to the Government. Therefore, the Government argues, the Supreme Court's statement in *Cohn,* concerning the necessity of an assertion of right against the Government, "was entirely gratuitous."

It is questionable whether a lower federal court may, with propriety, disregard a clear pronouncement in a decision of the Supreme Court of the United States, even though, analytically, it may constitute dictum.[4] However, passing this, we think that this statement in the *Cohn* opinion is not dictum, but is part of the rationale of that decision. In effect the Supreme Court said that there was no "claim" under the Act for either of two reasons, namely: (1) no right was asserted against the Government based upon the Government's own liability, and (2) the property which was sought and obtained was not that of the United States. Where an appellate court decision rests on two or more grounds, none can be relegated to the category of *obiter dictum. Woods* v. *Interstate Realty Co.,* 337 U.S. 535, 537.

The Government further argues, however, that the Supreme Court's subsequent decision in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, precludes reliance on the *Cohn* statement that, to be a "claim" under the Act. the effort to obtain federal funds or property must be founded on an asserted right against the Government. The Government made precisely the same contention in *United States* v. Howell, 9 Cir., 318 F.2d 162, 165. We rejected the contention in that case for reasons which we still find persuasive.

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[4] In *United States* v. *Howell,* 9 Cir., 318 F. 2d 162, 165, note 2, this court, dealing with a similar contention concerning this pronouncement in *Cohn,* quoted with approval *United States v. Tieger,* 3 Cir., 234 F.2d 589, 592, where it was said that:

> " '. . . to an inferior federal court, such a plain statement of a statute's meaning, adopted by the Supreme Court as the basis of its decision is much more than "dictum," however apparent it may seem to analysts that the court could have gone on a narrower ground, had it chosen to do so.' "

Moreover, in its later decision in *United States v. McNinch,* 356 U.S. 595, 600, n. 10, the Supreme Court indicated its continued acceptance of the *Cohn* construction of the Act, quoting the same language from *Cohn* that we have set out in note 3, above. In *McNinch,* the Supreme Court discussed the question of whether the transaction there in issue involved an assertion of right against the Government. *McNinch* at pages 598-599. However, the Court did not resolve that question. Instead the Court held that no claim was involved because no immediate disbursement of federal funds was sought. Nevertheless, the repetition of the *Cohn* definition at the end of the *McNinch* opinion, as a statement having "relevancy" in determining what constitutes a claim under the Act, demonstrates that this definition was not impaired by *Hess,* and is still recognized as a correct interpretation of the statute.

In holding that the *Cohn* definition of a "claim" under the Act has not been disavowed in later Supreme Court decisions, we are reaffirming a similar determination made in *United States* v. *Howell,* 9 Cir., 318 F.2d 162, 164-165. In there construing the statute as limited to efforts to obtain federal funds or property on the basis of an assertion of right, we observed:

> "If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent." (318 F.2d at 165)

It is true, as the Government contends, that it was not necessary to our decision in *Howell,* to hold that the *Cohn* definition includes, as one element, an assertion of right against the Government. Nevertheless, we find persuasive the reasons there stated for the view that the entire *Cohn* definition continues to represent the view of the Supreme Court.

Arguing, in effect, that our interpretation of *Cohn, Hess* and *McNinch,* as expressed in *Howell,* and in this opinion, must be erroneous, the Government cites the decisions of several courts of appeals which, it believes, show that the "assertion of right" element of the *Cohn* definition is generally disregarded. In each of these cases the Government prevailed and the court of appeals decision contains

no language expressly accepting the "assertion of right" element of the *Cohn* definition of "claim."

In five of the cases so cited, the "assertion of right" element was not discussed on appeal, but the transaction under consideration apparently did involve an assertion of right against the Government. Thus, in *United States v. Lagerbusch,* 3 Cir., 361 F.2d 449, federal funds were caused to be disbursed under an assertion of right arising under a cost-plus contract between Hercules Powder Company and the Government. The only contention made on appeal, however, and rejected, was that since the defendant did not deal directly with the Government, but with its cost-plus contractor, the Act did not apply.

In *United States v. Brown,* 4 Cir., 274 F.2d 107, federal funds were caused to be disbursed under an assertion of right in connection with a price support program administered by the C.C.C., and pursuant to a contract between it and a local cooperative. However, the only contention made on appeal, and rejected, was that defendant's fraudulent application to the local cooperative should not be regarded as an effort to obtain federal funds through the C.C.C.

Likewise, in *United States v. Alperstein,* S.D. Fla., 183 F.Supp. 548, *aff.*, 5 Cir., 291 F.2d 455, a veteran's application for hospital service from a Veteran's Administration hospital involved an assertion of right because the Administration was required by statute to provide hospital service to an eligible veteran. On appeal the only contention made was that the rendition of hospital service did not constitute a claim for "money or property" within the meaning of the Act. The contention was rejected in affirming judgment against the defendant.

In *Smith v. United States,* 5 Cir., 287 F.2d 299, there was an assertion of right to federal reimbursement and credits under a lease between the Government and a housing authority. The defendant director of the housing authority contended that the Act was inapplicable because it was not he, but the housing authority that received the benefit of his fraud in reporting excessive expenses. The court rejected this contention, holding that the Act applies even

where there is no direct liability running from the Government to the claimant.[5]

In *United States v. DeWitt,* 5 Cir., 265 F.2d 393, a real estate dealer fraudulently caused a lending institution to make assertions of right against the Government based upon a mandatory statute, which required the Government to pay a certain percentage of a qualified veteran's purchase-money home loan. Under the terms of the then existing statute (38 U.S.C., § 694(c) [Supp. IV, 1957], the Government was obligated to pay the sum if it had approved the loan. The court of appeals held the Government was entitled to summary judgment on remand of the case.

In each of the five cases reviewed above, an effort was made to obtain something from the federal Government on the basis of an assertion of right, but the defendant argued, on appeal, that he was not liable because he did not have direct dealings with an agency of the Government, or that what was sought was not "money or property" within the meaning of the Act, or that he did not personally benefit from the fraud. Rejection of these arguments, none of which brought directly into question the "assertion of right" element of the *Cohn* definition of a "claim," does not represent a disavowal of that element as a necessary ingredient of a civil cause of action under the Act.

In three other courts of appeals decisions cited by the Government, in which the Government was permitted to recover, it is doubtful that the disbursement of federal funds was made pursuant to an assertion of right. One of these cases is *United States v. Rainwater,* 8 Cir., 244 F.2d 27, *aff.* 356 U.S. 590. In *Rainwater,* the Act was

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[5] In reaching this result the court stated that it was sufficient that the false claim resulted "in the actual payment of Federal funds." 287 F.2d at 304. The Government relies on this language to demonstrate that the sole requirement for a claim under the Act is an "actual payment of Federal funds." Taken in context, however, this statement was apparently intended to explain that the Act could apply even though there was no direct disbursement of funds from the Government to the defendant.

applied to false applications submitted to the C.C.C. for the purpose of obtaining a loan on cotton. In the Eighth Circuit opinion in that case, the court dealt with the question of whether the complaint stated facts upon which relief could be granted where, as contended by the defendant, there was no specific allegation of damages. The Eighth Circuit held that the complaint was sufficient in this respect.

Neither the Supreme Court nor the Eighth Circuit Court of Appeals dealt with the question of whether the application for such a loan could be regarded as a "claim" under the Act, in the absence of any showing that the United States was legally obligated to make the loans.[6] It is true that the defendants were found liable, and this could not have happened unless the False Claims Act was assumed to be applicable in all respects. To this extent, *Rainwater* tends to support the Government's position. However, in the absence of any discussion or resolution in the decisions of the question which concerns us, we do not regard them as having significant precedent value on the point.

These observations concerning *Rainwater* are equally applicable to *Toepleman v. United States*, 4 Cir., 263 F.2d 697, also cited by the Government.[7]

The Government also relies on *Sell v. United States*, 10 Cir., 336 F.2d 467, 473-475. The defendant in this case submitted a false application for assistance under the emergency feed program administered by the C.C.C. The application was granted and, pursuant to the agency regulations, fully negotiable purchase orders were issued. Criminal proceedings were brought against the defendant under Section 15(a) of the Commodity Credit Corporation Charter Act, 62 Stat. 1074 (1948), as amended, 15 U.S.C. § 714m(a) (1964), and civil proceedings under the False Claims Act.

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[6] The only question presented to the Supreme Court was whether a claim against the C.C.C. was a claim against the United States. The Supreme Court held that it was.

[7] The *Toepleman* case had previously been before the Supreme Court on the precise issue as presented in *Rainwater* and was similarly decided in the *McNinch* opinion, rendered the same day as *Rainwater*. 356 U.S. at 596.

Defendant was convicted on the criminal charge and judgment was entered for the Government in the civil suit.

The only question apparently raised on appeal in the civil proceedings was whether the negotiable purchase orders issued by the C.C.C. to the defendant constituted property of the United States within the meaning of the False Claims Act. The court held that they did, and affirmed the judgment. The precise question of whether defendant's application constituted an assertion of right predicated on the Government's own liability, was not discussed. Nevertheless, since the judgment was affirmed, the decision tends to justify the Government's reliance on *Sell* to support its position.

The *Sell* decision, however, has even less precedent value than *Rainwater* or *Toepleman,* discussed above. We think the court in *Sell* erroneously equated the issues in the civil suit under the False Claims Act with those of the jointly tried criminal suit.[8] The criminal statute, unlike the False Claims Act, does not require that a "claim" be made against the United States, but requires only the making of a false "statement" for the purpose of influencing the action of the C.C.C., or for the purpose of obtaining money, property, or anything of value.

Had the False Claims Act contained language similar to that of the criminal statute instead of being restricted to "claims" against the United States, there is no doubt that the transactions here in question would have been covered. However, as the Supreme Court said in *United States v. McNinch*, 356 U.S. 595, 599 ". . . the False Claims Act was not designed to reach every kind of fraud practiced on the Government."

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[8] The court said:

> "The elements necessary to establish liability under the False Claims Act are set forth in the statute and the existence of all of those elements was at issue and established in the criminal action, with the exception of the requirement of the False Claims Act that the claimant be a person 'not in the military or naval forces of the United States . . .' " (336 F.2d at 475)

The decisions relied upon by the Government, and reviewed above, do not persuade us that we have erroneously interpreted the *Cohn, Hess* and *McNinch* decisions of the Supreme Court on the question of what constitutes a "claim" under the Act.

In our construction of the False Claims Act, we have kept in mind the warning of the Supreme Court in *McNinch:*

> ". . . that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute.[5] Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." (Footnote omitted.) 356 U.S. at 598.

The Government argues that the construction which we place upon the False Claims Act ". . . would provide an open invitation to seek and obtain by deception public monies to which there is no entitlement." Assuming that this would be the result, it would not be a valid reason for giving the Act a broader interpretation than the Supreme Court has sanctioned. Moreover, if there is need for transactions such as this to be covered by the False Claims Act, Congress may do so. In any event, this contention overlooks the criminal sanctions which are available against one who makes false statements for the purpose of influencing in any way the action of the C.C.C.[9]

Accordingly, we hold that the loan applications here in question did not constitute "claims" under the Act because they were not based upon assertions of legal right against the Government. The district court therefore correctly determined that the False Claims Act is inapplicable under the undisputed facts of this [redacted], and properly entered judgment for defendant.

Affirmed.

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[9] This is the same criminal statute upon which a conviction was obtained in *Sell v. United States,* 10 Cir., 336 F.2d 467, discussed above.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,945

UNITED STATES OF AMERICA, Appellant,

vs.

NEIFERT-WHITE COMPANY, Appellee.

JUDGEMENT

Appeal from the United States District Court for the District of Montana. This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered January 20, 1967.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1967

No. 267

UNITED STATES, Petitioner,
v.

NEIFERT-WHITE COMPANY.

ORDER ALLOWING CERTIORARI—Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THURGOOD MARSHALL,
Solicitor General,
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CITATIONS

266-695—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 20, 1967.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (App., *infra*, pp. 26–34) is reported at 247 F. Supp. 878. The opinion of the court of appeals (App., *infra*, pp. 13–24) is reported at 372 F. 2d 372.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 25) was entered on January 20, 1967. By order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to and including

June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the False Claims Act, 31 U.S.C. 231, extends to a false and fraudulent application for a federal loan which results in the disbursement of federal funds to which the applicant is not entitled.

STATUTE INVOLVED

The False Claims Act, 31 U.S.C. 231, provides in pertinent part:

> Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

This action was instituted by the United States against the respondent Neifert-White Company to recover statutory forfeitures under the False Claims Act, 31 U.S.C. 231. The facts are as follows.[1]

In order "to encourage the storage of grain on farms, where it can be stored at the lowest cost * * *", the Commodity Credit Corporation (CCC) was authorized by the Commodity Credit Corporation Charter Act of 1948 to "make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage * * *". 15 U.S.C. 714b(h).[2] Acting under its general authority to adopt "regulalations governing the manner in which * * * the powers vested in it may be exercised" (15 U.S.C. 714 b(d)), the CCC has provided for the granting of farm storage facility loans in amounts not exceeding 80 per cent of the actual purchase price of the storage bins. 23 F.R. 9687: To facilitate the enforcement of this limitation, the regulations require that the grain grower's loan application be accompanied by an invoice reflecting the actual cost of the storage bins and the amount of the down payment made by him (*ibid.*).

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[1] Since the complaint was dismissed for the failure to state a claim upon which relief could be granted, for present purposes the facts are undisputed.

[2] The Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture * * *" (15 U.S.C. 714) and within the meaning of the False Claims Act, see *Rainwater* v. *United States*, 356 U.S. 590, 591–592.

Respondent Neifert-White is a dealer in grain storage bins. In connection with sales of bins in 1959 to twelve grain farmers, an officer of respondent prepared invoices in which the purchase price of the bins was deliberately overstated (R. 2–15).[3] These false invoices were prepared for the purpose of fraudulently inducing the CCC to extend loans to respondent's customers in amounts in excess of the 80 per cent limitation (R. 2–15). They were submitted to the CCC together with the loan applications and the agency relied upon them in determining the amount of the loans to be extended (R. 2–15).

This suit under the False Claims Act, 31 U.S.C. 231, *supra*, p. 2, was thereafter instituted by the United States to recover from the respondent the forfeitures authorized by that statute with respect to those who, "for the purpose of * * * aiding to obtain the payment or approval" of a "false, fictitious, or fraudulent" claim against the United States, knowingly cause "to be made or used, any false bill, receipt, voucher * * *." On respondent's motion, the action was dismissed by the district court on the ground that an application for a CCC loan is not a "claim" within the meaning of the Act (App., *infra*, pp. 29–33). The court of appeals affirmed. Relying principally upon language in *United States* v. *Cohn*, 270 U.S. 339, 345–346, it concluded that the loan applications did not constitute "claims" because they "were not based upon assertions of legal right against the Government" (App., *infra*, p. 24).

[3] "R. —" refers to the typewritten record in the court of appeals which has been lodged with the Clerk.

REASONS FOR GRANTING THE WRIT

Reading the False Claims Act as embracing only claims "based upon assertions of legal right" against the government (App., *infra*, p. 24), the court below withdrew the protection of that Act from the CCC's extensive loan programs—protection that had been accorded them since at least this Court's decisions in *Rainwater* v. *United States*, 356 U.S. 590, and *United States* v. *Cato and Toepleman*, decided *sub nom. United States* v. *McNinch*, 356 U.S. 595. The decision of the court below conflicts with those of other courts of appeals; if permitted to stand it will have a substantial adverse impact upon the administration of numerous federal loan and subsidy programs involving the annual disbursement of billions of dollars from the public Treasury.

1. As the court below implicitly acknowledged, its requirement that the "claim" involve an "assertion of legal right" has not been imposed by any other court as a basis for defeating False Claims Act liability in circumstances akin to those here presented. To the contrary, the Act has been consistently held applicable to false and fraudulent endeavors to obtain the disbursement of federal funds or the transfer of public property without regard to whether a legally enforceable right to the funds or property had been asserted.

Thus, in *United States* v. *Rainwater*, 244 F. 2d 27 (C.A. 8), affirmed, 356 U.S. 590, imposition of statutory penalties under the Act was upheld as to those who had made false representations to the CCC for the purpose of obtaining loans on cotton crops. See

also, *United States* v. *Cato and Toepleman, supra,* both of which involved similar CCC loan applications: Although the single question in this Court was whether a claim filed with the CCC was a claim "against the Government of the United States" within the meaning of the Act, the resolution of that issue, as well as the ultimate imposition of liability, presupposed that the loan applications were "claims" under the Act.

Similarly, *Sell* v. *United States,* 336 F. 2d 467 (C.A. 10), held the Act applicable to a fraudulent application for assistance (in the form of surplus grains) under an emergency grain-feed program administered by the CCC. The court expressly concluded that the application "was a 'claim' as contemplated by the Act." 336 F. 2d at 474. See also, *Toepleman* v. *United States,* 263 F. 2d 697 (C.A. 4), certiorari denied, 359 U.S. 989; *United States* v. *Cherokee Implement Co.,* 216 F. Supp. 374 (N.D. Iowa) (application for CCC loan to finance purchase of farm equipment).

Although conceding that, in *Rainwater, Toepleman* and *Sell,* "the government was permitted to recover [even though] it is doubtful that the disbursement of federal funds was made pursuant to an assertion of right," the court below nevertheless found those decisions to be unpersuasive because in none was the "assertion of right" test specifically rejected (App., *infra,* pp. 20–21). At the same time, however, the court was unable to point to any holdings of other courts specifically adopting that test.

2. As previously noted, the court of appeals based its interpretation almost exclusively upon this Court's

statement in *United States* v. *Cohn*, 270 U.S. 339, 345–346, that "[t]he provision relating to the payment or approval of 'a claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." Taken in its context, that statement does not require the conclusion that a false application seeking the disbursement of public monies is not subject to the False Claims Act unless founded on an assertion of an enforceable right. Rather, it was addressed to entirely discrete circumstances.

In *Cohn*, by the use of false documents, the defendant had improperly obtained the release of merchandise being held by the customs authorities. No customs duties were owed on the importation of the merchandise, however, and the United States had no claim of ownership. It was to these factors that the Court's statement was addressed, for, as the Court pointed out (270 U.S. at 346), "obviously" the statutory provision relating to "claims" does not include

> * * * an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession. This is not the assertion of a "claim upon or against" the Government, within the meaning of the statute; and the delivery of the posses-

sion is not the "approval" of such a claim.[4]

The court of appeals also noted (App., *infra*, p. 17) that the *Cohn* dictum had been quoted as having "relevancy" in this Court's opinion in *United States* v. *McNinch*, 356 U.S. 595, 600, n. 10. The single issue in that case, however, was whether an application for credit insurance not calling for the immediate disbursement of federal funds was a "claim." In holding that it was not, the Court stressed (356 U.S. at 598–599):

> In agreeing to insure a home improvement loan the FHA *disburses no funds nor does it otherwise suffer immediate financial detriment.* It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any. [Emphasis supplied.][5]

Here, unlike *McNinch*, the government was called upon immediately to disburse funds on the basis of the false applications.

3. There is no sound reason why the application of the False Claims Act to a fraudulent application

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[4] See also, *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545, where the Court noted:

> The situation here is in no sense like that discussed in *United States* v. *Cohn*, 270 U.S. 399, 345–347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money * * * of the government's," while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

[5] It is significant that the Court expressly reserved decision "as to whether a lending institution's demand for reimburse-

for a federal loan should depend upon whether Congress made the granting of the loan mandatory or permissive. The primary purpose underlying the enactment of the False Claims Act was to stop the "plunder of the public treasury." *United States* v. *McNinch, supra,* 356 U.S. at 599.[6] Where, as here, the United States has been induced by fraud to disburse its funds, the impact on the public purse is no less because the false assertion was one of eligibility to receive, rather than legal entitlement to, the funds sought.

The consequences of the distinction drawn by the court of appeals are brought into sharp focus when it is applied to a farmer who falsely certifies that he is eligible for both (1) federal price support payments on his crop, and (2) a loan to finance the purchase of storage facilities for that crop. The court below agrees (App., *infra,* p. 19) that the false representation of eligibility for price support payments

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ment on a defaulted loan originally procured by a fraudulent application would be a 'claim' covered by the False Claims Act." 356 U.S. at 599, n. 6. Subsequently, in *United States* v. *Veneziale*, 268 F. 2d 504, the Third Circuit answered that question in the affirmative.

[6] The court below emphasized (App., *infra*, p. 23) this Court's admonition in *McNinch* that, because the civil provisions of the Act incorporates the Act's criminal provision, the rule of strict construction of criminal statutes should normally be followed. See 356 U.S. at 598. We think it clear, however, that because no novel reading or application of the Act is sought (see cases discussed, *supra*, pp. 5–6), the rule of construction followed in a companion case to *McNinch*—involving, as here, an application for a CCC loan—should govern, *i.e.*, that "even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.'" *Rainwater* v. *United States*, *supra*, 356 U.S. at 593.

would constitute a violation of the False Claims Act (see *United States* v. *Brown*, 274 F. 2d 107 (C.A. 4)) because it involves an "assertion of right." Since, however, the grant of a storage-facility loan is discretionary, the second false representation would not be similarly actionable. This disparity would result although the vice in both cases is identical: the use of false pretenses to obtain federal funds. It needs no argument that, if the government were to become aware of the deceit in sufficient time, no federal funds would be disbursed on a fraudulent application regardless of whether that application were labeled as "of right" or, instead, were addressed to the discretionary authority of the particular agency.

4. The question is a recurring one. We are advised by the Department of Agriculture that, during the fiscal year ending June 30, 1966, the CCC made almost 4½ million loans on price support commodities alone, in the total amount of almost two billion dollars. In addition, it extended more than nine thousand storage-facilities and equipment loans in a total amount of approximately 13½ million dollars. Substantial numbers of loans, involving in the aggregate enormous sums of federal money, are made under other lending programs administered by the Department of Agriculture and other governmental agencies.

Moreover, while entitlement to some grants-in-aid and other forms of subsidy may be asserted "as a matter of right," the great majority of such disbursements are made on a discretionary basis (*e.g.*, grants in connection with the poverty program and the scien-

tific and educational programs administered by the Department of Health, Education and Welfare). Thus, if the interpretation given the False Claims Act by the court below is allowed to stand, additional billions of dollars in annual federal expenditures would be deprived of this important—and highly effective—statutory protection.[7]

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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JUNE 1967.

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[7] To be sure, the decision below does not leave the government completely remediless. In other cases there may be an action at common law (see, *e.g.*, *United States* v. *Silliman*, 167 F. 2d 607 (C.A. 3), certiorari denied, 335 U.S. 825); and an offender may of course be prosecuted criminally (see 18 U.S.C. 1001; 15 U.S.C. 714m). But no other civil remedy is nearly as effective or comprehensive as that provided by the False Claims Act. And if that Act is (as we think) applicable, the penalties of the criminal law may be reserved for circumstances which particularly call for such sanctions.

APPENDIX

1. Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 20, 1967]

No. 20,945

UNITED STATES OF AMERICA, APPELLANT

v.

NEIFERT-WHITE COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

Before: CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against Neifert-White Company, based upon the civil provisions of the False Claims Act (Act), R.S. §§ 3490 and 5438 (1875), 31 U.S.C. § 231 (1964).[1] Defendant

[1] The statute, as set forth in 31 U.S.C. § 231, reads in part as follows:

"Any person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon or against the Government

answered and moved for judgment on the pleadings. The district court granted the motion and entered a judgment dismissing the action. *United States* v. *Neifert-White Company,* D.C. Mont., 247 F. Supp. 878. The Government appeals.

The facts of this case are not in dispute. Neifert-White is in the business of selling grain storage bins to farmers in Montana. Under the government Farm Storage Facility Loan Program, any grain grower purchasing grain storage bins could make application to borrow from the Commodity Credit Corporation (C.C.C.) an amount not to exceed eighty percent of the actual purchase price of these bins.[2]

Each applicant was required to submit a loan application to the local Agricultural Stabilization and Conservation Committee, accompanied by an invoice for the actual cost of the grain storage bins. During 1959 Neifert-White sold grain storage bins to twelve growers and assisted each of them in obtaining a loan

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of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

In bringing this action under the False Claims Act, based upon the transactions described above, the Government did not assert that it had sustained any damages. Accordingly, the Government sought recovery only of the $2,000 statutory penalty for each of the twelve alleged violations, as authorized by section 231, aggregating $24,000.

[2] This program existed pursuant to the provisions of Section 4(h) of the Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948), as amended, 15 U.S.C. § 714b(h) (1964), and is administered pursuant to that agency's Farm Storage Facilities regulations, 7 CFR § 1474.721–769.

from the C.C.C. An officer of Neifert-White prepared false invoices which overstated the sales price of the storage bins sold, enabling the purchasers to qualify for larger loans. Relying upon these false invoices, the C.C.C. approved loans to the twelve applicants in excess of eighty percent of the bins' actual purchase price.

The district court granted Neifert-White's motion for judgment on the pleadings on the ground that the loan applications to the C.C.C. were not "claims" within the meaning of the Act. The court reasoned that the loan applications "* * * were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money." 247 F. Supp. at 881. Such applications, the court held, were no more than unenforceable invitations to enter into loan contracts.

The Government concedes that there was no legal obligation on the part of the United States to approve the grain growers' applications for such loans. It argues, in effect, however, that where an application to the Government is for the purpose of obtaining the disbursement or transfer of federal funds or property, it constitutes a "claim" within the meaning of the Act, even though the applicant does not assert an enforceable legal right to such disbursement or transfer. There is no question that these applications were for the disbursement of federal money.

The meaning which the Government would give to the statutory term "claim," is contrary to that expressed in *United States* v. *Cohn,* 270 U.S. 339, involving a criminal prosecution for a violation of the Act. The Supreme Court there made it clear that a "claim" under that Act involves two elements, both of which must be present, namely: (1) an effort to ob-

tain a disbursement or transfer of federal funds or property, (2) to which funds or property a right is asserted against the Government, based upon the Government's own liability to the claimant.[3] The second of these two elements is lacking in our case.

The Government argues that the pronouncement in *Cohn,* that a claim against the Government relates to money or property to which a right is asserted against the Government is dictum and should be disregarded. In support of this view, the Government contends that, in *Cohn,* the Supreme Court held for the defendant on the ground that since the property the defendant sought to obtain was duty-free merchandise in the possession of the collector of customs, there had been no effort to obtain any funds or property belonging to the Government. Therefore, the Government argues, the Supreme Court's statement in *Cohn,* concerning the necessity of an assertion of right against the Government, "was entirely gratuitous."

It is questionable whether a lower federal court may, with propriety, disregard a clear pronouncement in a decision of the Supreme Court of the United States, even though, analytically, it may con-

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[3] The Court there stated:

"While the word 'claim' may sometimes be used in the broad juridical sense of 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg* v. *Pennsylvania*, 16 Pet. 539, 615, it is clear in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." (270 U.S. at 345–346.)

stitute dictum.[4] However, passing this, we think that this statement in the *Cohn* opinion is not dictum, but is part of the rationale of that decision. In effect the Supreme Court said that there was no "claim" under the Act for either of two reasons, namely: (1) no right was asserted against the Government based upon the Government's own liability, and (2) the property which was sought and obtained was not that of the United States. Where an appellate court decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537.

The Government further argues, however, that the Supreme Court's subsequent decision in *United States ex. rel. Marcus* v. *Hess,* 317 U.S. 537, precludes reliance on the *Cohn* statement that, to be a "claim" under the Act, the effort to obtain federal funds or property must be founded on an asserted right against the Government. The Government made precisely the same contention in *United States* v. *Howell,* 9 Cir., 318 F. 2d 162, 165. We rejected the contention in that case for reasons which we still find persuasive.

Moreover, in its later decision in *United States* v. *McNinch,* 356 U.S. 595, 600, n. 10, the Supreme Court indicated its continued acceptance of the *Cohn* construction of the Act, quoting the same language from *Cohn* that we have set out in note 3, above. In *Mc-*

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[4] In *United States* v. *Howell,* 9 Cir., 318 F. 2d 162, 165, note 2, this court, dealing with a similar contention concerning this pronouncement in *Cohn*, quoted with approval *United States* v. *Tieger*, 3 Cir. 234 F. 2d 589, 592, where it was said that:

> "'* * * to an inferior federal court, such a plain statement of a statute's meaning, adopted by the Supreme Court as the basis of its decision is much more than "dictum," however apparent it may seem to analysts that the court could have gone on a narrower ground, had it chosen to do so.'"

Ninch, the Supreme Court discussed the question of whether the transaction there in issue involved an assertion of right against the Government. *McNinch* at pages 598–599. However, the Court did not resolve that question. Instead the Court held that no claim was involved because no immediate disbursement of federal funds was sought. Nevertheless, the repetition of the *Cohn* definition at the end of the *McNinch* opinion, as a statement having "relevancy" in determining what constitute a claim under the Act, demonstrates that this definition was not impaired by *Hess,* and is still recognized as a correct interpretation of the statute.

In holding that the *Cohn* definition of a "claim" under the Act has not been disavowed in later Supreme Court decisions, we are reaffirming a similar determination in *United States* v. *Howell,* 9 Cir., 318 F. 2d 162, 164–165. In there construing the statute as limited to efforts to obtain federal funds or property on the basis of an assertion of right, we observed:

> "If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent." (318 F. 2d at 165)

It is true, as the Government contends, that it was not necessary to our decision in *Howell,* to hold that the *Cohn* definition includes, as one element, an assertion of right against the Government. Nevertheless, we find persuasive the reasons there stated for the view that the entire *Cohn* definition continues to represent the view of the Supreme Court.

Arguing, in effect, that our interpretation of *Cohn, Hess and McNinch,* as expressed in *Howell,* and in this opinion, must be erroneous, the Government cites the decisions of several courts of appeals which, it be-

lieves, show that the "assertion of right" element of the *Cohn* definition is generally disregarded. In each of these cases the Government prevailed and the court of appeals decision contains no language expressly accepting the "assertion of right" element of the *Cohn* definition of "claim."

In five of the cases so cited, the "assertion of right" element was not discussed on appeal, but the transaction under consideration apparently did involve an assertion of right against the Government. Thus, in *United States* v. *Lagerbusch,* 3 Cir., 361 F. 2d 449, federal funds were caused to be disbursed under an assertion of right arising under a cost-plus contract between Hercules Powder Company and the Government. The only contention made on appeal, however, and rejected, was that since the defendant did not deal directly with the Government, but with its cost-plus contractor, the Act did not apply.

In *United States* v. *Brown,* 4 Cir., 274 F. 2d 107, federal funds were caused to be disbursed under an assertion of right in connection with a price support program administered by the C.C.C., and pursuant to a contract between it and a local cooperative. However, the only contention made on appeal, and rejected, was that defendant's fraudulent application to the local cooperative should not be regarded as an effort to obtain federal funds through the C.C.C.

Likewise, in *United States* v. *Alperstein,* S.D. Fla., 183 F. Supp. 548, *aff.,* 5 Cir., 291 F. 2d 455, a veteran's application for hospital service from a Veteran's Administration hospital involved an assertion of right because the Administration was required by statute to provide hospital service to an eligible veteran. On appeal the only contention made was that the rendition of hospital services did not constitute a claim for "money or property" within the meaning

of the Act. That contention was rejected in affirming judgment against the defendant.

In *Smith* v. *United States*, 5 Cir., 287 F. 2d 299, there was an assertion of right to federal reimbursement and credits under a lease between the Government and a housing authority. The defendant director of the housing authority contended that the Act was inapplicable because it was not he, but the housing authority that received the benefit of his fraud in reporting excessive expenses. The court rejected this contention, holding that the Act applies even where there is no direct liability running from the Government to the claimant.[5]

In *United States* v. *DeWitt*, 5 Cir., 265 F. 2d 393, a real estate dealer fraudulently caused a lending institution to make assertions of right against the Government based upon a mandatory statute, which required the Government to pay a certain percentage of a qualified veteran's purchase-money home loan. Under the terms of the then existing statute (38 U.S.C., § 694(c) [Supp. IV, 1957], the Government was obligated to pay the sum if it had approved the loan. The court of appeals held the Government was entitled to summary judgment on remand of the case.

In each of the five cases reviewed above, an effort was made to obtain something from the federal Government on the basis of an assertion of right, but the defendant argued, on appeal, that he was not

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[5] In reaching this result the court stated that it was sufficient that the false claim resulted "in the actual payment of Federal funds." 287 F. 2d at 304. The Government relies on this language to demonstrate that the sole requirement for a claim under the Act is an "actual payment of Federal funds." Taken in context, however, this statement was apparently intended to explain that the Act could apply even though there was no direct disbursement of funds from the Government to the defendant.

liable because he did not have direct dealings with an agency of the Government, or that what was sought was not "money or property" within the meaning of the Act, or that he did not personally benefit from the fraud. Rejection of these arguments, none of which brought directly into question the "assertion of right" element of the *Cohn* definition of a "claim," does not represent a disavowal of that element as a necessary ingredient of a civil cause of action under the Act.

In three other courts of appeals decisions cited by the Government, in which the Government was permitted to recover, it is doubtful that the disbursement of federal funds was made pursuant to an assertion of right. One of these cases is *United States* v. *Rainwater,* 8 Cir., 244 F. 2d 27, *aff.* 356 U.S. 590. In *Rainwater,* the Act was applied to false applications submitted to the C.C.C. for the purpose of obtaining a loan on cotton. In the Eighth Circuit opinion in that case, the court dealt with the question of whether the complaint stated facts upon which relief could be granted where, as contended by the defendant, there was no specific allegation of damages. The Eighth Circuit held that the complaint was sufficient in this respect.

Neither the Supreme Court nor the Eighth Circuit Court of Appeals dealt with the question of whether the application for such a loan could be regarded as a "claim" under the Act, in the absence of any showing that the United States was legally obligated to make the loans.[6] It is true that the defendants were found liable, and this could not have happened unless the False Claims Act was assumed to be applicable in all respects. To this extent, *Rainwater* tends to sup-

[6] The only question presented to the Supreme Court was whether a claim against the C.C.C. was a claim against the United States. The Supreme Court held that it was.

port the Government's position. However, in the absence of any discussion or resolution in the decisions of the question which concerns us, we do not regard them as having significant precedent value on the point.

These observations concerning *Rainwater* are equally applicable to *Toepleman* v. *United States*, 4 Cir., 263 F. 2d 697, also cited by the Government.[7]

The Government also relies on *Sell* v. *United States*, 10 Cir., 336 F. 2d 467, 473–475. The defendant in this case submitted a false application for assistance under the emergency feed program administered by the C.C.C. The application was granted and, pursuant to the agency regulations, fully negotiable purchase orders were issued. Criminal proceedings were brought against the defendant under Section 15(a) of the Commodity Credit Corporation Charter Act, 62 Stat. 1074 (1948), as amended, 15 U.S.C. § 714m(a) (1964), and civil proceedings under the False Claims Act. Defendant was convicted on the criminal charge and judgment was entered for the Government in the civil suit.

The only question apparently raised on appeal in the civil proceedings was whether the negotiable purchase orders issued by the C.C.C. to the defendant constituted property of the United States within the meaning of the False Claims Act. The court held that they did, and affirmed the judgment. The precise question of whether defendant's application constituted an assertion of right predicated on the Government's own liability, was not discussed. Nevertheless, since the judgment was affirmed, the decision tends to justify the Government's reliance on *Sell* to support its position.

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[7] The *Toepleman* case had previously been before the Supreme Court on the precise issue as presented in *Rainwater* and was similarly decided in the *McNinch* opinion, rendered the same day as *Rainwater*, 356 U.S. at 596.

The *Sell* decision, however, has even less precedent value than *Rainwater* or *Toepleman,* discussed above. We think the court in *Sell* erroneously equated the issues in the civil suit under the False Claims Act with those of the jointly tried criminal suit.[8] The criminal statute, unlike the False Claims Act, does not require that a "claim" be made against the United States, but requires only the making of a false "statement" for the purpose of influencing the action of the C.C.C., or for the purpose of obtaining money, property, or anything of value.

Had the False Claims Act contained language similar to that of the criminal statute instead of being restricted to "claims" against the United States, there is no doubt that the transactions here in question would have been covered. However, as the Supreme Court said in *United States* v. *McNinch,* 356 U.S. 595, 599 "* * * the False Claims Act was not designed to reach every kind of fraud practiced on the Government."

The decisions relied upon by the Government, and reviewed above, do not persuade us that we have erroneously interpreted the *Cohn, Hess* and *McNinch* decisions of the Supreme Court on the question of what constitutes a "claim" under the Act.

In our construction of the False Claims Act, we have kept in mind the warning of the Supreme Court in *McNinch:*

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[8] The court said:

"The elements necessary to establish liability under the False Claims Act are set forth in the statute and the existence of all of those elements was at issue and established in the criminal action, with the exception of the requirement of the False Claims Act that the claimant be a person 'not in the military or naval forces of the United States * * *.'" (336 F. 2d at 475)

> "* * * that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute.[5] Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." [Footnote omitted.] 356 U.S. at 598.

The Government argues that the construction which we place upon the False Claims Act "* * * would provide an open invitation to seek and obtain by deception public monies to which there is no entitlement." Assuming that this would be the result, it would not be a valid reason for giving the Act a broader interpretation than the Supreme Court has sanctioned. Moreover, if there is need for transactions such as this to be covered by the False Claims Act, Congress may do so. In any event, this contention overlooks the criminal sanctions which are available against one who makes false statements for the purpose of influencing in any way the action of the C.C.C.[5]

Accordingly, we hold that the loan applications here in question did not constitute "claims" under the Act because they were not based upon assertions of legal right against the Government. The district court therefore correctly determined that the False Claims Act is inapplicable under the undisputed facts of this case, and properly entered judgment for defendant.

Affirmed.

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[5] This is the same criminal statute upon which a conviction was obtained in *Sell* v. *United States*, 10 Cir., 336 F. 2d 467, discussed above.

2. JUDGEMENT OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,945

UNITED STATES OF AMERICA, APPELLANT

v.

NEIFERT-WHITE COMPANY, APPELLEE

Appeal from the United States District Court for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered January 20, 1967.

3. Opinion and Order of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

Filed December 6, 1965

Opinion and Order No. 1229

United States of America, plaintiff

v.

Neifert-White Co., a corporation, defendant

This is a civil action brought by the government under the provisions of the False Claims Act, 31 U.S.C. § 231 et seq. to recover the penalties provided by that Act. Jurisdiction of the action is expressly conferred on this court by 31 U.S.C. § 232(A).

Section 231 of Title 31 provides in pertinent part as follows:

> "Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claims to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or

> approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit, and such forfeiture and damages shall be sued for in the same suit."

The complaint alleges that at all times pertinent to the action there existed, pursuant to Section 4(h) of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714(b)(h), the government's Farm Storage Facility Loan Program under which qualified borrowers were eligible to obtain from the government to finance the purchase of grain storage bins, loans of not to exceed 80% of the actual purchase price paid by the borrower for said bins. The complaint contains 12 causes of action in each of which it is charged with respect to a different borrower under the program that the defendant, a dealer in grain storage bins, assisted the respective borrowers to obtain loans in excess of 80% of the purchase price actually paid for the grain storage bins purchased by furnishing false invoices which showed the purchase price of the respective bins purchased to be greater than the purchase price actually paid. As an example, in the First Cause of Action, it is alleged that the actual price for which the bins were sold to a named borrower was $650 each, on which, under the program, the borrower would have been entitled to a loan of only $520 each, but that defendant furnished an invoice showing the price paid for the bins was $725

each, and thereby the borrower obtained loans of $580 on each bin. The remaining causes of action contain similar allegations with respect to different borrowers. The government concedes that there was no default on any of the loans and that it suffered no damage, and seeks only the penalty provided by the Act on each count.

Defendant filed an answer in which the First Defense to each cause of action was that the complaint failed to state a claim upon which relief can be granted, and thereafter moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. At the time of pretrial conference the motion for judgment on the pleadings was heard and briefs in support of and in opposition to the motion were submitted, and the motion was taken under advisement.

Preliminarily it should be noted that the motion is timely since it was made after the pleadings were closed and within such time as not to delay the trial of the action, as required by Rule 12(c).

Defendant's position on the motion is that the loan applications by the various borrowers, which were supported by the allegedly false invoices furnished by defendant, are not false claims against the government within the meaning of the False Claims Statute, 31 U.S.C. § 231. After considering the briefs of the parties and the authorities cited therein, the court is of the opinion that the defendant's position is correct.

At the outset it should be pointed out that the False Claims Act was not designed to reach every fraud practiced upon the government. As the Court of Appeals for the Ninth Circuit stated in *United States* v. *Howell,* 318 F. 2d 162 (1963) at page 165:

> "If the (False Claims) Act were intended to cover any and all attempts to cheat the

> United States, we doubt that the Congress would have used the word 'claim' to specify such an intent. The Supreme Court of the United States has made it clear that the 'False Claims Act was not designed to reach every kind of fraud practiced on the Government.' *United States* v. *McNinch, supra,* 356 U.S., at 599, 78 S. Ct at 953, 2 L. Ed 1001. See also *United States* v. *Cochran, supra,* 235 F. 2d at 131–134."

In *United States* v. *Cohn,* 270 U.S. 339, at 345–346 (1926) the Supreme Court defined what is a claim within the meaning of the False Claims Act in the following words:

> "While the word 'claim' may sometimes be used in the broad juridical sense of a 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property *to which a right is asserted against the Government, based upon the Government's own liability to the claimant."* [Emphasis supplied.]

In *United States* v. *McNinch,* 356 U.S. 595 (1958) the Supreme Court found the above quoted 1926 definition still relevant in determining what is a claim within the meaning of the False Claims Act. This definition has also been adopted and applied in the Ninth Circuit in *United States* v. *Howell, supra,* and

in the Third Circuit in *United States* v. *Tieger*, 234 F. 2d 589 (1956).

Applying the above definition of a "claim" to the facts alleged in the complaint in the instant case, it immediately becomes apparent that the loan applications presented to the government by the borrowers, supported by the false invoices furnished by defendant were not "claims for money or property to which a *right* was asserted against the Government based on the Government's own liability" to the borrowers, because the Government was under no liability to those borrowers. The loan applications herein involved were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money.

In 54 C.J.S. "Loans", p. 654, it is stated

> "*A loan of money has been defined as a contract* by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows * * * A loan of money is something more than the mere delivery of money by the owner to another. In order to *constitute a loan there must be a contract* whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use."

Viewing a loan as a contract, an application for a loan is an invitation to enter a contract. In *United States* v. *Tieger*, 234 F. 2d 589 (1956) the Court of Appeals for the Third Circuit noted at 591,

> "But this privilege of contracting certainly is not a claim in normal business or legal usage and terminology."

And in footnote 7 in the *Tieger* case on 591, the court observed

> "The 'claim' must be presented for 'payment or approval.' This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter a contract."

The decisions in *United States* v. *Tieger, supra,* which incidentally was approved by the Supreme Court in *United States* v. *McNinch, supra,* and *United States* v. *Veneziale,* 268 Fed. 504 (1959), both decided in the Third Circuit, are illustrative of the proposition that in order for there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability to the claimant. Both cases involved false statements made to the Government by the defendants, through private lending institutions, for the purpose of obtaining home improvement loans which were subsequently insured by the Government under Title I of the Federal Housing Act. In the *Tieger* case, the loans were subsequently repaid by the borrowers and no claim against the Government under its loan insurance ever resulted. The Third Circuit held that no offense under the False Claims Act was established, even though false statements resulted in the Government issuing insurance on the loans, because no claim was made against the Government based on its own liability. On the other hand, in the *Veneziale* case, the borrowers defaulted on the loans, and the lending institutions made a claim against the Government for repayment of the loans based on the

loan insurance which it had issued as a result of the false statements presented to it. In this case the court found an offense under the False Claims Act because the Government found itself faced with an enforceable demand for money based upon its liability under the loan insurance which it had been fraudulently induced to issue.

In this case, the loan applications, even though supported by false invoices, did not constitute an enforceable demand for money on the Government based on any liability of the Government to the borrowers.

In opposition to the motion the Government relies on the cases of *Rainwater* v. *United States,* 356 U.S. 590 and the cases of *Toepleman* v. *United States, United States* v. *Cato* and *United States* v. *McNinch,* decided in a joint opinion at 242 F. 2d 359 and 356 U.S. 595. In the *Rainwater* case the only question presented and decided was whether a claim against Commodity Credit Corporation was a claim against the United States within the meaning of the False Claims Act. The Supreme Court decided that it was. No question was raised or decided in that case as to what constitutes a claim within the meaning of the Act. The same is also true of the *Cato* and *Toepleman* cases. With reference to those cases the Supreme Court said at 356 U.S. 596 "The Court of Appeals reversed on the ground that a false claim against Commodity was not a claim 'against the Government of the United States, or any department or officer thereof' within the meaning of that Act. The sole question before us so far as these two actions are concerned, is whether the Court of Appeals erred in so deciding. For the reasons set forth in *Rainwater* we hold that it did." Therefore, it is obvious that the *Rainwater, Cato* and *Toepleman* cases are no au-

thority for the Government's position here.

The *McNinch* case is directly against the Government's position, and supports the views hereinbefore expressed. In that case at 356 U.S. 599, the Supreme Court said:

> "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government. From the language of that Act, read as a whole in the light of normal usage, and the available legislative history, we are led to the conclusion that an application for credit insurance does not fairly come within the scope that Congress intended the Act to have."

The Government also relies on *United States* v. *Cherokee Implement Company,* 216 F. Supp. 374. In that case the court stated:

> "In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. 231."

The cases referred to are *McNinch, Rainwater* and *Veneziale, supra* and *Smith* v. *United States,* 287 F. 2d 299; *United States* v. *Brown,* 274 F. 2d 107 and *United States* v. *Globe Remodeling Co., Inc.,* 196 F. Supp. 652. None of the cases involved moneys paid out as a result of an application for a loan except *Rainwater,* and as pointed out above the question of whether an application for a loan is a claim was neither raised or decided. *McNinch* involved, as above indicated, an application for credit insurance and it was there decided that a false application for credit insurance was not a false claim within the meaning of the Act. *Veneziale,* as pointed out above, involved a claim under the government's liability on credit insurance it had been fraudulently induced to issue.

Smith v. *United States* involved the submission of false quarterly reports from which rentals to be paid under a lease from the Federal Government were to be determined. *United States* v. *Brown* involved false claims for support prices on tobacco. *United States* v. *Globe Remodeling Co.*, like *Veneziale*, involved a false claim against the Government on its liability on credit insurance it had fraudulently been induced to issue under the Federal Housing Act. For these reasons the court does not find the *Cherokee Implement Co.* case convincing.

THEREFORE, IT IS ORDERED and this does order that the defendant's motion for judgment on the pleadings be and the same is hereby granted, and each cause of action, and the complaint and the action is hereby ordered dismissed on the ground that neither the complaint nor any of its causes of action states a claim for relief under the provisions of 31 U.S.C., Section 231.

Done and dated this 3rd day of December, 1965.

W. D. MURRAY,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

JUL 17 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, *Petitioner*,
v.
NEIFERT-WHITE COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the Respondent In Opposition

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the Respondent In Opposition

QUESTION PRESENTED

It is the Respondent's position that the question presented can be more accurately stated in the following manner: Does filing an invoice in support of an application for a loan from a Government agency constitute participation in making a claim against the government with the meaning of the False Claims Act?

REASONS FOR DENYING PETITION

INTRODUCTION

The Government's Petition for a writ of certiorari should not be granted. In substance, the Government's argument is that the proper test for determining whether a "claim" has been made under the provisions of the False Claims Act is whether there has been a disbursement of Government Funds. It is, and has been, the position of the Respondent Neifert-White Company that a "claim" within the meaning of the False Claims Act is a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. The Respondent has based its position on the language and history of the Act and upon the opinions of this Court and the opinions of the Circuit Courts of Appeals and the District Courts of the United States. Four distinguished judges have expressed their agreement with Respondent's position.

Rule 19 of the rules of this Court sets forth the "character or reasons" which, although not exclusive, measure the exercise of this Court's discretion in granting or denying a petition for certiorari. In an attempt to come within the purview of Rule 19, the Government urges (Petition, page 5) that the decision below conflicts with those of other courts of appeals. Significantly, this is the only Rule 19 "reason" advanced in the Government's petition.

1. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS.

In support of its argument that the rulings of the circuit courts are in conflict, the Government relies heavily on *Rainwater v. United States*, 356 U.S. 590, and *United States v. Cato and Toepleman*, decided *sub nom. United States v. McNinch*, 356 U.S. 595. As both of the prior decisions in this case clearly point out, neither *Rainwater*, *Cato* nor *Toepleman* ever decided what it was that constituted the making of a claim against the Government under the provisions of the False Claims Act. All those cases decided was that a person who perpetrates a fraud against a Government-owned corporation is not insulated from liability because he has dealt with a Government-owned corporation rather than the Government itself. In short, the two decisions handed down in this case have not changed the law as stated in *Rainwater*, *Cato* and *Toepleman* because those cases never considered the question that has been presented in this case.

The Government argues in its Petition that the loan applications involved in *Rainwater*, *Cato* and *Toepleman* were presupposed to be "claims" within the meaning of the Act, and that, therefore, these cases must stand for the proposition that loan applications are "claims" under the False Claims Act. The Respondent respectfully submits that such presuppositions do

not constitute authority for that proposition. The simple and obvious reason is that the question was not presented to the Court in those cases and the Supreme Court, and indeed appellate courts in general, do not decide questions that are not presented to them. *Baltimore & Philadelphia Steamboat Company v. Augustus P. Norton*, 285 U.S. 408. Indeed, there is no evidence whatsoever that would indicate that the issue was ever raised at any level in the three cases relied upon so heavily by the Government. (See *United States v. Rainwater*, 244 F. 2d 27 (8th Cir. 1957) and *Toepleman v. United States*, 263 F. 2d 97 (4th Cir. 1957).

For the same reasons we have just indicated, the Government's argument that the decision below withdraws the protection of the False Claims Act from the Commodity Credit Corporation's loan programs is completely without merit.

The Government's petition also states that the requirement that the "claim" involve an "assertion of legal right" has not been imposed by any other court as a basis for defeating False Claims Act liability in circumstances akin to those here presented. To this we only wish to reply that neither has the requirement that the "claim" involve an "assertion of a legal right" been rejected as a basis for defeating False Claims Act liability under *any* circumstances.

It would seem that the strongest authority that the

Government can find for its proposition that the courts below have rendered decisions that are not in harmony with the case law is to be found in *Sell v. United States*, 336 F. 2d 467 (10th Cir. 1954) and *United States v. Cherokee Implement Co.*, (D.C. Iowa, 1963) 216 F. Supp. 374. However, an examination of these cases leads to the same conclusion reached by the courts below, i.e. that they have no value as precedent because of the very obvious mistakes that are incorporated in the opinions.

The fundamental error in *Sell* was lucidly discussed by the court below at 372 F. 2d 377 (see also pages 22 and 23 of the Government's Petition). The court below pointed out that the court in *Sell* erroneously equated the requirements for conviction in the jointly tried criminal suit with the requirements for finding liability under the False Claims Act. The difference between the two is that the False Claims Act requires that a "claim" be made against the United States while the criminal statute requires only that a false statement be made for the purpose of influencing the action of the CCC.

The errors made by the court in the *Cherokee Implement* case were vividly demonstrated by Judge Murray's opinion in the case before us (see 247 F. Supp. at 882, or pages 33 and 34 of Petition). The fact that the 9th Circuit concurred in Judge Murray's evaluation of the *Cherokee Implement* case is

demonstrated by the fact that it did not even consider the case worthy of mention in its opinion, even though the case was thoroughly argued by both sides in their briefs. We do not consider the case of sufficient import to warrant further discussion here as any refutation would only be repetitious of the District Court's opinion.

2. THE RULE STATED IN *United States v. Cohn* THAT A "CLAIM" IS NOT MADE UNLESS THERE HAS BEEN A RIGHT ASSERTED AGAINST THE GOVERNMENT, BASED ON THE GOVERNMENT'S OWN LIABILITY, HAS ALWAYS BEEN THE LAW.

In the court below, the Government argued that *United States ex rel. Marcus v. Hess*, 317 U.S. 537 abrogated *United States v. Cohn*, 270 U.S. 339, and precluded the possibility of its use as a precedent in the instant case. Realizing the impropriety of their former position, the Government now seeks to explain *Cohn* and *United States v. McNinch*, 356 U.S. 595, on the theory that since neither case involved the distribution of government property, they did not involve a "claim". In other words, the Government is attempting to shore up its argument that the test for the presence of a "claim" is whether there has been a distribution of property. In addition to doing violence to the accepted legal and business usage of the term "claim", the Government's argument would completely nullify the use of the term in the Act, and

would, in effect, make 31 U.S.C. §231 a carbon copy of 18 U.S.C. §1001 (the criminal statute). It is entirely reasonable to conclude that since Congress included the term "claim" in one statute (i.e. the False Claims Act) and left it out of the other (i.e. the criminal statute) that it intended the standards for liability under the two Acts to differ in at least this one vital aspect.

The Government also argues that the definition of a "claim" as given by *Cohn* was merely dictum, and that it was directed at a "discrete set of circumstances" that bear no resemblance to the situation before us now. The answer to this argument is found in Judge Hamley's opinion in the circuit court and is found at 372 F. 2d 374-375 (see also pages 16-17 of the Petition). There, Judge Hamley pointed out that there were two reasons that were equally dispositive of the case, the first being that no right was asserted against the Government based on the Government's own liability, and the second was that the property which was sought and obtained was not that of the United States. This Court handed down the *Cohn* decision in 1926. In 1958 this Court reaffirmed validity of *Cohn* in the opinion it delivered in *McNinch*. *Cohn*, following the obvious dictates of the language of the statute, established the "assertion of right" test. This has always been the proper test for liability under the False

Claims Act and no decision by a Federal Court has ever said otherwise. This is the law. The 9th Circuit's opinion in this case merely affirmed the established rule. The law has not changed. No protection has been withdrawn which was present before. The Government is fighting to preserve a statute that existed only in its briefs. It is not the same statute that is found at 31 U.S.C. §231.

3. THE COURT BELOW PROPERLY REFUSED TO GIVE A BROADER INTERPRETATION TO THE ACT THAN IS SANCTIONED BY THE LANGUAGE OF THE ACT OR THE DECISIONS OF THIS COURT.

The Government argues that "There is no sound reason why the application of the False Claims Act to a fradulent application for a federal loan should depend upon whether Congress made the granting of the loan mandatory or permissive." (Petition, pages 8-9). The sound reason the Government seems to have overlooked is found in the language of the act.

> ". . . [I]t is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property *to which a right is asserted against the Government, based upon the Government's own liability to the claimant.*" *United States v. Cohn*, 270 U.S. 339, at 345-346. (Emphasis supplied).

The Government cites *United States v. McNinch*,

supra for the proposition that the underlying purpose for enacting the False Claims Act was to stop the plunder of the public treasury. We hasten to point out that the *McNinch* opinion also contains the following statement: "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch, supra,* at 599. The types of fraud clearly excluded are those that do not involve "claims". An additional point is that an invitation to enter into a secured loan agreement can hardly be classified as "plunder of the treasury."

We wish to quote further from *McNinch.*

> "But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." *United States v. McNinch, supra* at 598.

In footnote 6 on page 9 of the Petition, the Government argues that the rule of construction followed in *Rainwater* should apply here, and since *Rainwater* involved an application for a CCC loan, the Government is justified in construing the statute in such a manner as to allow it to be applied here. The Government has confused the issues. In *Rainwater*, the

sole question was whether a claim against the CCC was a claim against the Government within the meaning of the Act. In holding that it was, the Court obviously felt that the Act had been given a fair meaning in accord with the evident intent of Congress. The fallacy in the Government's argument lies in the fact, already discussed, that *Rainwater* did not decide or even consider the question as to whether an application for a CCC loan was a claim within the meaning of the Act. Therefore, application of the same rule of construction in the instant case will not necessarily yield the same result as it did in *Rainwater* (i.e. liability under the Act) for the very obvious and simple reason that in the present case we are dealing with an entirely different question that involves a separate and distinct provision in the statute.

It is a well established principle that where a statute imposes criminal sanctions, as the False Claims Act indeed does, the language of the statute should be required to give fair warning to the public as to what sort of conduct is condemned, and further, that if any ambiguity exists in such a statute, the ambiguity should be construed against the government. In deciding that an airplane did not come within the meaning of the term "motor vehicle" under the provisions of the National Motor Vehicle Theft Act, the eminent Mr. Justice Holmes said:

". . . [I]t is reasonable that a fair warning

> should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States*, 283 U.S. 25 at 27.

If four distinguished and learned Federal Judges have decided that the Respondent's conduct was not condemned by the language of the False Claims Act, then it certainly cannot be said that the Respondent, whose officers are mere laymen, could possibly have had fair warning that its conduct would subject it to False Claims Act liability.

The Government is also worried about the disparity between the results if a farmer falsely certifies that he is eligible for a price support payment on his crop and a loan for crop storage facilities. The cause of the Government's worry was pointed out by *McNinch*. The False Claims Act simply does not cover all types of fraud. Thus, the Government's quarrel is not with the application of the statute, but rather, with the statute itself.

4. THE GOVERNMENT'S ARGUMENT THAT THE DECISION BELOW WILL HAVE AN ADVERSE EFFECT ON VARIOUS GOVERNMENT PROGRAMS HAS NO MERIT.

The Government urges that if the decision below is allowed to stand, it will have a "substantial impact upon the administration of numerous federal loan and subsidy programs." This is the identical argument advanced in the court below and rejected in Judge Hamley's decision (372 F. 2d at 378, and page 24 of the Petition). As pointed out in the decision below, this argument cannot and does not justify broadening of the interpretation given this Civil War statute by this Court in *Cohn* and *McNinch*. Moreover, if the Government needs relief, that relief must come from Congress and not from the courts.

It is obvious that if all of the loans and support payments involved in the myriad of programs administered by the CCC, not to mention the poverty and educational programs administered by the Department of Health, Education and Welfare, contain the same provisions as the secured loans involved in the instant case, the False Claims Act is not needed to prevent any plundering of the treasury.[1] The mort-

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[1]The terms of the loan contracts involved in this case can be found at 23 Federal Register 5029 (July 2, 1958). It is to be noted that §474.752 requires that the county committee, or some other person authorized by the CCC, make a determination as to whether a mortgage on the facility alone is sufficient security for the loan. If it is not, the county committee can demand an addi-

gage agreements here supply all the protection that the Government could ask for. It should be noted that the pleadings in this case indicate that not more than a few hundred dollars was loaned out improperly by the Government in all of the twelve individual transactions. Moreover, the pleadings, for very good reason, do not contain any allegation that any of the loans were ever defaulted or that the Government suffered so much as the loss of one penny in these transactions, and indeed, the implication is clear that it profited to the extent of the interest on the principal.

Finally, the Court below pointed out that the Government's argument on this point overlooked the fact that the Government could prosecute criminally. In answer, the Government in its Petition advises that they regard the False Claims Act as their "primary weapon" and that the penalties of the criminal law should be "reserved for circumstances which particu-

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tional mortgage on a saleable unit of real estate as further security. As additional insurance, §474.727 of the Regulations requires that the constructed facility be inspected by a designated employee of the county committee or the committee itself before the actual disbursement of the loan takes place.

The loans are made for a period of 4 years and the interest rate is 4% per annum on the unpaid balance. The Regulations provide that the contract is to include an acceleration clause and a severance agreement. All liens required as security must be first liens. It is clear that only the gross neglect or incompetence of the county committee could cause the Government to lose any money under agreements such as these, regardless of the percentage of the purchase price of the facility that the Government actually financed.

larly call for such sanctions." (Petition, page 11, footnote 7). They fail to advise this Court that Neifert-White has already been prosecuted under the criminal act (Criminal No. 3940, U.S. District Court for the District of Montana, Helena Division), although none of the farmers and ranchers who actually made the applications for loans have ever been touched by the wrath of the Justice Department.

CONCLUSION

In conclusion, we respectfully submit that the Petition for Writ of Certiorari should be denied for the reason that no question is presented here which requires resolution by the Supreme Court, and for the additional reason that the Respondent should not be put to the great expense of defending yet another appeal that is based on neither law nor reason.

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July 14, 1967

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (J.A. 25) is reported at 247 F. Supp. 878. The opinion of the United States Court of Appeals for the Ninth Circuit (J.A. 33) is reported at 372 F. 2d 372.

JURISDICTION

The judgment of the court of appeals (J.A. 43) was entered on January 20, 1967. By order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to and including June 19, 1967. The petition for a writ of certiorari was filed on June 19, 1967, and granted on October 9, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the False Claims Act applies to a false and fraudulent application for a federal loan which results in the disbursement of federal funds to which the applicant is not entitled.

STATUTES INVOLVED

The False Claims Act provides in pertinent part:

R.S. § 3490 (1878):

> Any person not in the military or naval forces of the United States * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act * * *.

R.S. § 5438 (1878):

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to

> contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.[1]

STATEMENT

This action was instituted by the United States against the respondent, Neifert-White Company, to recover statutory forfeitures under the False Claims Act, 31 U.S.C. 231. The facts are as follows:[2]

The Commodity Credit Corporation (CCC) was authorized by the Commodity Credit Corporation Charter Act of 1948 to "make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage * * *." 15 U.S.C. 714b(h).[3] Acting under its general authority to adopt

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[1] The civil portion of the False Claims Act has been codified at 31 U.S.C. 231. The criminal portion has been altered (see 18 U.S.C. 287, 1001), but R.S. § 3490 incorporates, unchanged, the criminal provisions as set out in R.S. § 5438. *Rainwater* v. *United*, 356 U.S. 590, 592–593.

[2] Since the complaint was dismissed for the failure to state a claim upon which relief could be granted, for present purposes the facts are undisputed.

[3] The Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture * * *" (15 U.S.C. 714) and within the meaning of the False Claims Act, see *Rainwater* v. *United States*, 356 U.S. 590, 591–592.

"regulations governing the manner in which * * * the powers vested in it may be exercised" (15 U.S.C. 714b(d)), the CCC has provided for the granting of farm storage facility loans in amounts not exceeding 80 percent of the actual purchase price of the storage bins, 23 F.R. 9687. To facilitate the enforcement of this limitation, the regulations require that the grain grower's loan application be accompanied by an invoice showing the actual cost of the storage bins and the amount of the down payment made by him (*ibid*).

Respondent is a dealer in grain storage bins. In selling bins, in 1959, to twelve grain farmers, one of its officers prepared invoices in which the purchase price was deliberately overstated. This was done in order fraudulently to induce the CCC to extend loans to respondent's customers in amounts in excess of the 80 percent limitation. The invoices were submitted to the CCC together with the loan applications, and the agency relied upon them in determining the amount of the loans to be extended (J.A. 2–15).

The United States thereafter brought this suit under the False Claims Act to recover the forfeitures authorized by that statute with respect to those who, "for the purpose of * * * aiding to obtain the payment or approval" of a "false, fictitious, or fraudulent" claim against the United States, knowingly cause "to be made or used, any false bill, receipt, voucher * * *." On respondent's motion, the action was dismissed by the district court on the ground that an application for a CCC loan is not a "claim" within the meaning of the Act (J.A. 27). The court of appeals affirmed.

SUMMARY OF ARGUMENT

This Court has recognized that in enacting the False Claims Act the purpose of Congress was "broadly to protect the funds and property of the Government from fraudulent claims." *Rainwater* v. *United States*, 356 U.S. 590, 592. The court below, however, construed the Act as applying only to those situations in which the claim involves the assertion of a legal right against the government, and not to loan applications and other claims which are addressed to the discretion of the governmental agency involved.

This view would in large measure frustrate Congress' purpose to protect the public treasury. It is of no practical consequence whether the funds are disbursed as a result of a fraudulent claim of right or on the basis of a fraudulent application for a loan; in either instance the government runs a serious risk of loss if the fraud is not uncovered.

Nor does the statutory language require that result. In referring to "any claim upon or against the Government", Congress showed that it did not intend the coverage of the Act to be limited to a particular type of claim. Similarly, the reference to "the payment or allowance" of a claim, suggests that the term "claim" embraces situations involving a discretionary disbursement of government funds.

This Court's decisions also support the conclusion that the term "claim" refers to any application that results in the disbursement of government funds or the distribution of government property. Thus, it has held that "claims" are not limited to matters involving a right that could be legally enforced against the

government. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537.

United States v. *Cohn*, 270 U.S. 339, which the court below viewed as compelling the conclusion that "claim" is limited to an assertion of a legal right, does not require that result. *Cohn*, which involved a false application to obtain the release of non-dutiable merchandise from the custody of the customs authorities, stands only for the proposition that for there to be a "claim upon or against the Government" the claimant must be seeking to obtain either funds or property which actually belong to the government.

ARGUMENT

AN APPLICATION FOR A LOAN IS A "CLAIM" WITHIN THE MEANING OF THE FALSE CLAIMS ACT

The single issue presented by this case is whether an application for a loan may constitute a "claim upon or against the Government" within the meaning of the False Claims Act. While this issue has never been expressly considered by this Court, the Court has recognized that, in enacting the False Claims Act, "the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made" and that "[b]y any ordinary standard the language of the Act is certainly comprehensive enough to achieve that purpose." *Rainwater* v. *United States*, 356 U.S. 590, 592.

The court below held, however, that the only false claims covered by the Act are those based upon "as-

sertions of legal rights against the Government," and that since "there was no legal obligation on the part of the United States to approve the grain growers' applications for loans", the frauds committed by the respondent here were not actionable (J.A. 35, 42).

We believe that the distinction drawn by the court below—one which makes the incidence of the Act depend upon whether the government agency's obligation to disburse funds is mandatory or discretionary—is out of keeping with the statutory purpose and not required by the statutory language. We also submit that the relevant authority supports the conclusion that the term "claim" includes all applications which seek the disbursement of government funds or the distribution of government property.

Our construction is certainly in accord with Congress' broad objective, as shown by the legislative history of the Act, to stop the "plundering of the public treasury." *United States* v. *McNinch*, 356 U.S. 595, 599. The False Claims Act was passed in 1863, 12 Stat. 696, as a result of congressional investigations[4] which had disclosed "defrauding and plundering"[5] of the United States in connection with the expenditure of government funds to support the Civil War effort. While those hearings and debates contain no mention of a distinction between "legal right" and other types of claims, it is clear that what concerned

[4] The report of the investigating House committee, and the testimony which it heard, are found in H. Rep. No. 2, Parts 1 and 2, 37th Cong., 2d Sess.

[5] Remarks of Senator Howard, the Floor manager of the Act, Cong. Globe, 37th Cong., 3d Sess. at 955. The entire debate is at pp. 952–958.

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Congress was the financial loss to the government because of fraud. It is obvious the Treasury may be as seriously depleted by fraudulent loan applications as by overstated contract claims. As this Court stated in a slightly different context in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 544, "These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard depend upon the bookkeeping devices used for their distribution."

There is nothing in the language of the Act to deter the Court from giving full effect to the Congressional purpose of preventing the plunder of the public treasury, regardless of the type of funds involved. The critical language is the phrase "*any* claim upon or against the Government * * *" (R.S. 5438, emphasis supplied). By use of the word "any", Congress drew wide the circle of protection. That it intended the Act to embrace claims which were not based on the assertion of an absolute right is also apparent from the fact that the Act refers to "the payment or *allowance* of any false or fraudulent claim" (emphasis supplied). The concept of "allowance" bears out the view that a "claim" may extend to an application for a discretionary disbursement of government funds.

This conclusion is also convincingly supported by this Court's decision in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537. In *Hess* the Court held that the False Claims Act applied to collusive bids submitted to local governmental units to obtain contracts to perform P.W.A. projects where a substantial portion of

the funds to pay the local governments' obligations under the contracts was to be provided by grants in aid from the United States. The contractors argued that "claim", as used in the False Claims Act, "means that the claim must be based upon the Government's own liability to the claimant * * *";[6] that "[i]t is not sufficient under the provisions of R.S. § 5438 that the defendants make or present claims for payment or approval to an officer * * * of the United States" because there must also be a contractual relationship between the United States and the claimant;[7] and that the respondent contractors could not have "sued the Government" had the local governments failed to make payment on the contracts.[8] This Court, however, rejected these arguments, stating (317 U.S. at 544–545):

> These provisions [of the False Claims Act], considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

This is a clear ruling that the term "claim" is not limited to situations involving a right that could be legally enforced against the government.

United States v. *McNinch*, 356 U.S. 595, is likewise consistent with the views we urge, although the Court ruled in that instance that the Act did not

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[6] Brief for Respondents in No. 173, October Term, 1942, p. 29.

[7] *Id.* at p. 31.

[8] *Id.* at p. 32.

apply to the transaction in question. Again, the Court recognized that the term "claim" was not limited to a claim of right to government money but could be literally construed to embrace any assertion of "a right or privilege to draw upon the Government's credit" (*id.* at 598). *McNinch,* however, involved statements made in applications for credit insurance presented to the Federal Housing Administration. In holding that this application was not a claim, the Court noted (*id.* at 599):

> "[T]he conception of a claim against the government normally connotes a demand for money or for some transfer of public property." *United States* v. *Tieger,* 234 F. 2d 589, 591. In agreeing to insure a home improvement loan the FHA *disburses no funds nor does it otherwise suffer immediate financial detriment.* * * * [Emphasis added.] [9]

Unlike the applications for credit insurance in *McNinch,* the loan applications in the case at bar clearly call for the disbursement of government funds. The applicants asserted that they had met the requirements of the statute and applicable regulations and that they were, therefore, entitled to receive the fed-

[9] The Court in *McNinch* did not pass on the question that might be raised by a future default on the insured loan, stating:

> Since there has been no default here, we need express no view as to whether a lending institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a "claim" governed by the False Claims Act [*id.* at 599, n. 6].

This question is answered in the affirmative by *United States* v. *Veneziale,* 268 F. 2d 504 (C.A. 3), and *United States* v. *Ridglea State Bank,* 357 F. 2d 495, 497 (C.A. 5).

eral funds which were actually disbursed to them as loans.[10]

It is worth noting that two other cases were decided in the same opinion with *McNinch—United States* v. *Cato Bros., Inc.* and *United States.* v. *Toepleman.* Both of those cases involved false statements contained in loan applications submitted to the Commodity Credit Corporation. Interestingly, the only issue raised in those cases was whether a claim upon the CCC was a claim "upon * * * the Government," an issue decided affirmatively in an identical case decided the same day, *Rainwater* v. *United States,* 356 U.S. 590. In none of these cases was the issue whether a loan application is a "claim" raised by either the par-

[10] Although the government did concede in the court below that there was no legal obligation on the part of the government to approve the loan applications, an application to the CCC for a loan is an assertion by the applicant that he is entitled to receive the funds because he has complied with the applicable statute and regulations. Moreover, the CCC Charter Act itself contemplates that such loan applications should be granted whenever an applicant qualifies for a loan under the applicable regulations. Thus, the statute, 15 U.S.C. 714b(h), provides:

> * * * That to encourage the storage of grain on farms, where it can be stored at the lowest cost, the Corporation *shall make loans to grain growers needing storage facilities* when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage, and these loans shall be deducted from the proceeds of price support loans or purchase agreements made between the Corporation and the growers. * * * [Emphasis supplied.]

The fact that the application is filed with an administrator rather than in a court and that the administrator has a broad discretion to determine eligibility does not detract from the conclusion that the applicant is asserting a right to participate in the program.

ties or the Court, even though the cases were argued and decided with *McNinch* in which the meaning of the word "claim" was hotly contested. Similarly, in a number of lower court cases raising questions as to the application of the False Claims Act, the parties and the courts have consistently assumed that the term "claim" included an application for a loan. See, *e.g., United States* v. *Templeton,* 199 F. Supp. 179 (E.D. Tenn.) (Commodity Credit Corporation crop loan application); *United States* v. *Cherokee Implement Co.,* 216 F. Supp. 374 (N.D. Iowa) (false application for Commodity Credit Corporation equipment loan). See, also, *Sell* v. *United States,* 336 F. 2d 467 (C.A. 10) (fraudulent application for emergency feed under the Commodity Credit Corporation's emergency feed program).

In deciding that the false applications for government loans in this case were not encompassed by the False Claims Act, the court below relied almost exclusively on the following statement in *United States* v. *Cohn,* 270 U.S. 339, 345–346:

> * * * the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. * * *

However, when this language is considered in the context of the factual situation involved in *Cohn,* it becomes clear that the case may be readily reconciled with the Court's subsequent rulings.

The *Cohn* case was a criminal prosecution for the submission of false statements in support of an application by an importer to remove certain non-dutiable imported merchandise from a United States customs house. A shipment of cigars had arrived in Chicago from the Philippines and was being held by the collector of customs. The cigars, which were duty-free, were consigned to the defendant Cohn but the bill of lading was being held by a bank pending Cohn's payment of the draft. Cohn obtained possession of the merchandise by falsely representing that the bill of lading had not arrived and by fraudulently inducing certain customs-house brokers to post a bond with the collector guaranteeing the subsequent production of the bill of lading. On these facts this Court assumed that the collector had been wrongly induced to deliver the cigars to the defendant but held that "[o]btaining the possession of non-dutiable merchandise * * * is not obtaining the approval of a 'claim upon or against' the Government, within the meaning of the statute." 270 U.S. at 345. Since the merchandise was not property owned by the government and no customs duties were imposed upon it, the Court held that there was no "claim against the Government" within the meaning of the Act.

Since Cohn's request for the cigars was based on a claim that he was legally entitled to them, the Court had no occasion to determine whether there is a distinction between a claim of right and a request for money addressed to the discretion of the disbursing officer. Thus, it seems clear that the language in *Cohn*, quoted above, was addressed solely to the lack of gov-

ernmental interest in the property obtained by the false representation; it had no concern with the question whether the claim involved the assertion of a judicially enforcible right or a request for a discretionary payment. This conclusion is apparent from the Court's comparison of the False Claims Act with the general fraud statute (*id.* at 346–347):

> [The False Claims Act] * * * has no words extending the meaning of the word "defrauding" beyond its usual and primary sense. On the contrary it is used in connection with the words "cheating or swindling," indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to *the fraudulent causing of pecuniary or property loss.* And this meaning is emphasized by other provisions in the section in which the word "defraud" is used in reference to the obtaining of money or other property from the Government by false claims, vouchers and the like; and by the *context of the entire section which deals with the wrongful obtaining of money and other property of the Government* * * *. [Emphasis supplied.] [11]

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[11] The conclusion is also supported by a reading of the full passage in *Cohn*, from which the language relied on by the court below was taken:

> * * * the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. And obviously it does not include an application for the entry and delivery of non-dutiable merchandise, *as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for*

In short, the situation in the instant case is unlike that in *Cohn* and analogous to that in *United States ex rel. Marcus* v. *Hess, supra,* at 545, where the Court stated:

> The situation here is in no sense like that discussed in *United States* v. *Cohn,* 270 U.S. 339, 345–347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money * * * of the government's," while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

Cohn, we submit, stands simply for the proposition that there is a "claim upon or against the Government," only if the claimant is seeking to obtain funds or property which actually belong to the government. To read the case (as the court below did) as limiting the term "claim" to "assertions of legal rights against the Government" would lead to absurd results.[12] Thus,

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delivery to the person who may be entitled to its possession. This is not the assertion of a "claim upon or against the Government, within the meaning of the statute; and the delivery of the possession is not the "approval" of such a claim [Emphasis supplied.]

[12] It should also be noted that it is not entirely clear what the court below meant by its use of the terms "liability of the government" and "legal obligations." We assume that a tort or contract right which is enforceable in a court of law is a claim of right. However, the adoption of the standard of the court below would raise serious problems of interpretation. Would the "legal obligation" standard embrace a demand for funds founded on a tort for which the United States has not consented to be sued, but for which the United States provides an administrative

a farmer who falsely certifies that he is eligible for both (1) federal price support payments on his crop and (2) a loan to finance the purchase of storage facilities for that crop would violate the False Claims Act in the first case but not in the second. Compare *United States* v. *Brown*, 274 F. 2d 107 (C.A. 4), with the opinion below (J.A. 33). This disparity would result even though the vice in both cases is identical: the use of false pretenses to obtain federal funds.

Another example of the arbitrary consequences which follow from the court of appeals' construction is provided by *Alperstein* v. *United States*, 291 F. 2d 455 (C.A. 5), affirming 183 F. Supp. 548 (S.D. Fla.). *Alperstein* involved a veteran who misrepresented his financial status in order to gain free treatment at a veterans Administration hospital for a non-service-connected disability. The court found (183 F. Supp. at 550) that the relevant statute, 38 U.S.C. (1952 ed.) 706, 48 Stat. 525, created a claim of right because it left no discretion to the Veterans Administration in admitting all veterans with non-service-connected disabilities who filed a sworn statement that they could not afford payment, subject only to limitations of space. However, a 1958 amendment to the relevant statute left no doubt that the grant of free medical care for a non-service-connected disability was dis-

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remedy? Similarly, would the standard of the court below embrace a claim for veteran's benefits, where the benefits are created and defined by statute, but the decision whether a veteran qualifies for the benefits is committed to the unreviewable determination by the Veterans Administration? Is the availability of judicial review the *sine qua non* of a legal obligation?

cretionary.[13] Under the Ninth Circuit's reasoning, a fraudulent pre-1958 application for treatment of non-service-connected disabilities would come within the protection of the False Claims Act, but a post-1958 application would not.

In light of the numerous governmental programs authorizing grants or loans, the list of examples might be extended. It suffices to say that the Act's terms do not require such capricious results and that this Court's consistent pronouncements permit uniform application of the statute to all cases in which there is a false application for public funds or property. The overriding purpose of the Act—to protect the federal Treasury—requires no less.

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[13] 38 U.S.C. 610(a), 72 Stat. 1141, provides that the Administrator, within limitations of space, "*may* furnish hospital care which he determines is needed" to a veteran with a non-service-connected disability who is unable to pay. (Emphasis added.)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with directions to reinstate the complaint.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, *Petitioner*,

v.

NEIFERT-WHITE COMPANY, *Respondent*.

Brief of Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, *Petitioner*,

v.

NEIFERT-WHITE COMPANY, *Respondent*.

Brief of Respondent

QUESTION PRESENTED

Does filing an invoice in support of an application for a loan from a Government agency constitute participation in making a claim against the Government within the meaning of the False Claims Act?

STATUTE INVOLVED

31 U.S.C. provides in pertinent part:

"Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may

have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

SUMMARY OF THE ARGUMENT

The court below properly applied the definition of the term "claim" that this Court provided in *United States v. Cohn*, 270 U.S. 339. This definition was central to the decision in *Cohn* and its continuing relevancy was recognized by this Court in *United States v. McNinch*, 356 U.S. 595. Normal usage and understanding would not consider an application for a loan to be a "claim". Indeed, a loan application is nothing more than a request to enter into a contractual relationship.

It is true that there have been a few cases where liability has been imposed under the False Claims Act where it would appear that a "claim" as defined in *United States v. Cohn*, 270 U.S. 339, was not present. These cases fall into two categories. The first cgateory is characterized by cases such as *Rainwater v. United States*, 356 U.S. 590, which did not even consider whether a "claim" was involved and therefore did not decide it. The second category is characterized by *United States v. Cherokee Implement Co.*, 216 F. Supp. 374 (N.D. Iowa), which demonstrated fundamental errors in interpreting the applicable law.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, and *United States v. McNinch*, 356 U.S. 595, this Court recognized that the False Claims Act can only be applied where a claim, based on the Government's own liability to the claimant, is involved. In *Hess*, the fraudulent collusive bidding practices of contractors caused the Government to pay claims that were made by the local sponsors of P.W.A. projects. Liability was imposed under the Act. In *McNinch*, fraudulent misrepresentations had been made on loan applications in order to secure F.H.A. approval and insurance. However, since the loans were not defaulted, liability was not imposed because the fraudulent applications did not result in a claim being made against the Government, based on the Government's liability to claimant.

The overriding purpose of the civil section of the False Claims Act is readily ascertainable from its language. It was meant to provide protection to the public treasury against false "claims", as that term was defined in *United States v. Cohn*, 270 U.S. 339. The fact that the criminal sections of the Act (18 U.S.C. § 287 and § 1001) contain language that clearly encompasses the making of both false claims and false statements and that language referring to false statements is totally absent in the civil section is a clear directive that the term "claim" is not to be given the broad meaning urged by the Government. It is

not the function of the courts to rewrite ancient statutes so that they will fit smoothly into the scheme of modern legislation. That is a task properly left to the legislative branch.

ARGUMENT

1. A "CLAIM" WITHIN THE MEANING OF THE FALSE CLAIMS ACT IS A CLAIM FOR MONEY OR PROPERTY TO WHICH A RIGHT IS ASSERTED AGAINST THE GOVERNMENT, BASED UPON THE GOVERNMENT'S OWN LIABILITY TO THE CLAIMANT.

The transactions we are dealing with here involve applications for loans. The defendant submitted an allegedly false invoice in support of the loan applications. These loans, the terms of which are fully set out in note 12 herein, were fully repaid and the Government has not asserted or alleged that it suffered any damages as a result of any of these transactions. Under these circumstances, can it be said that the defendant made, or caused to be made a claim against the Government?

In *United States v. Cohn*, 270 U.S. 339, at 345-346, this Court said:

> While the word "claim" may sometimes be used in the broad juridical sense of a "demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty" (Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L.ed. 1060 1089),

> it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant.

The Government has consistently argued that *Cohn* stands only for the narrow proposition that there is no claim against the Government where the property involved does not belong to the Government. The court below disagreed with this argument and took the position that *Cohn* held that there was no "claim" under the Act for two reasons: (1) no right was asserted against the Government based upon the Government's own liability to the claimant, and (2) the property which was sought and obtained did not belong to the United States.[1] Clearly, both reasons are equally dispositive of the case. Thus, the *Cohn* definition of the term "claim" is certainly valid and binding, and is not to be disregarded as having no bearing on the holding of the case. Indeed, this Court recognized its continuing significance in *United States v. McNinch*, 356 U.S. 595.

In addition, careful consideration of the *Cohn* case, and of the language found in the statute leads to

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[1]A. 36.

the inevitable conclusion that this definition given to the term "claim" is not only required by the statute, but also reflects the common usage and understanding of the term.

The instant case involves applications for loans.

> A loan of money is something more than the mere delivery of money by the owner to another. In order to constitute a loan there must be a contract whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use.[2]

If a loan is a contract, then an application for a loan is a request to enter into a contractual relationship. In this sense, the applications involved here are very much like the applications for FHA insured loans that have given rise to a number of cases under the False Claims Act. The Farm-Storage Facility Loan Program was designed to grant the growers of certain commodities the privilege of borrowing money to finance the purchase of storage facilities. In *United States v. Tieger*, 234 F.2d 589 at 591 (C.A. 3), a False Claims Act case involving fraudulent applications for FHA insured loans, the court said that, ". . . this privilege of contracting certainly is not a claim in normal business or legal usage and terminology."

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[2]54 C.J.S. "Loans," p. 654. Also cited in District Court opinion at A. 28.

In footnote No. 7 of the *Tieger* opinion, the court made the following observation:

> The "claim" must be presented for "payment or approval." This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter into a contract.

The Government argues that the various federal courts have applied the test that they urge (i.e. has there been a disbursement of money or property?) and that if the 9th Circuit's interpretation of *Cohn* is allowed to stand it will not be consistent with the subsequently decided False Claims Act cases. This is not the case. Most of the cases relied upon by the Government in their argument below did indeed involve claims against the Government in that the claim was based on the Government's own liability to the claimant. The only cases which found liability in which it would appear that a claim based upon the Government's liability to the claimant was not involved fall into two categories. The first category is composed of *Rainwater v. United States*, 356 U.S. 590; *United States v. Cato Bros., Inc.* and *United States v. Toepleman*, which were decided in the same opinion with *United States v. McNinch*, 356 U.S. 595, and the case cited at page 12 of the Government's brief *United States v. Templeton*, 199 F.Supp. 179 (E.D. Tenn.). In these cases a claim, based upon

the Government's own liability to the claimant, does not seem to be present. However, not one of the cases addressed itself to the question as to whether an application for a loan constituted the making of a claim against the Government. Indeed, there is nothing to indicate that the issue was ever raised at any point of the proceedings in any of these cases. At page 12 of Appellant's brief, the following statement is found:

> Similarly, in a number of lower court cases raising questions as to the application of the False Claims Act, the parties and the courts have consistently assumed that the term "claim" included an application for a loan.

Such assumptions do not constitute legal precedent and indeed, there is nothing to indicate that this Court indulged in such a presumption when it decided *United States v. McNinch*, 356 U.S. 595. In short, these cases are not valid authority for the proposition for which the Government cites them.

The second category of cases is represented by *Sell v. United States*, 336 F.2d 467 (C.A. 10) and *United States v. Cherokee Implement Co.*, 216 F.Supp. 374 (N.D. Iowa). The *Cherokee* case involved a fraudulent application for a Commodity Credit Corporation equipment loan. In response to the defendant's motion to dismiss the Court said that, "Where the United States actually makes a loan by reason of a false ap-

plication, there may be a claim under the false claims statute." *Id.*, 216 F.Supp. at 375. For this proproposition, the court cites *Rainwater v. United States*, 356 U.S. 590. As we have pointed out, *Rainwater* simply did not decide this question and, therefore, does not provide authority for the proposition for which the *Cherokee* opinion cites it. But this is not the principal error in the decision.

In the course of its opinion, the court said:

> In United States v. Veneziale, 268 F.2d 504 (3rd Cir. 1959), it was considered a false claim when the Government had to pay on a loan guaranteed. In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. §231, Smith v. United States, 287 F.2d 299 (5th Cir. 1961); United States v. Brown, 274 F.2d 107 (4th Cir. 1960); United States v. Globe Remodeling Co., Inc., L.C. 196 F.Supp. 652. (*United States v. Cherokee Implement Co.*, 216 F.Supp. 374 at 375.)

The *Veneziale* case involved an FHA insured loan that was defaulted. The loan application had been fraudulent and when the loan was defaulted the Government was called upon to make good on its guaranty. The *Globe Remodeling Co.* case likewise involved Governmental liability as a guarantor on a defaulted loan. The *Smith* case involved a contract whereby the Government agreed to lease one of its housing projects.

to the Beaumont Housing Authority. Under the terms of the contract, the amount of rental was to be equal to the amount by which operating revenues exceeded approved expenses. The Government also agreed to advance funds to cover operating deficits. Mr. Smith, an employee of Beaumont, submitted false quarterly reports which indicated that the operating revenues were less than the approved expenses, thus requiring the Government to advance funds to cover the deficit. The *Brown* case involved false claims for support prices on a tabacco crop. Clearly, none of these cases involved money that was paid out as the result of a loan application. In *Veneziale* and *Globe Remodeling Co.* money was paid out because there had been a default on a separate loan contract. Loans were not even involved in the other cases.

In *Sell v. United States*, 336 F.2d 467 (C.A. 10) the defendant had been indicted and charged with a violation of 15 U.S.C. § 714m(a).[3] Subsequently, the Gov-

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[3] 15 U.S.C. §714m (a) provides as follows:

"(a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

We wish to note that this is the same provision Neifert-White was indicted under in the criminal action brought against it. Criminal No. 3490, U.S. District Court for the District of Montana, Helena, Division.

ernment filed a complaint in a civil action seeking to collect double damages and a $2,000.00 penalty under the provisions of 31 U.S.C. § 231. The criminal case was tried and the defendant was convicted. The Government then moved for a summary judgment in the civil action upon the theory that the factual issues in both cases were identical and that they had already been determined. The Government was successful.

On appeal, the 10th Circuit affirmed the decision granting the summary judgment and in so doing made the following statement:

> The elements necessary to establish liability under the False Claims Act are set forth in the statute and the existence of all of those elements was at issue and established in the criminal action, with the exception of the requirement of the False Claims Act that the claimant be a person "not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States." *Id.*, 336 F.2d at 475.

As the Court below pointed out,

> The criminal statute, unlike the False Claims Act, does not require that a "claim" be made against the United States, but requires only the making of a false "statement" for the purpose of influencing the action of the C.C.C., or for the purpose of obtaining money, property, or anything of value.[4]

[4] A. 41.

This fundamental error destroys the value of the *Sell* case as an applicable precedent in the instant case.

The Government argues that *United States ex rel. Marcus v. Hess*, 317 U.S. 537 ". . . is a clear ruling that the term 'claim' is not limited to situations involving a right that could be legally enforced against the government."[1] We do not agree. At 317 U.S. 542-543 this Court said:

> We think the conduct of these respondents comes well within the prohibition of the statute which includes "every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such a claim to be . . . fraudulent."
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> * * *
>
> The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. *By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding.* (Emphasis supplied.)

Thus, it would appear that the ruling of this Court in *Hess* was that liability extended to anyone who *caused* a false claim to be made against the Government. The opinion of the Court below does not say that the False Claims Act applies only where the person guilty of

[1]Brief For The United States, p. 9.

fraud makes a claim against the Government based on the Government's liability to him. The Act itself and the cases make it perfectly clear that it is not necessary that the person guilty of the fraud make the claim against the Government himself, or that the Government's liability be to him. (Of course the Act would apply under such conditions.) What is required by the Act, the cases and the opinion of the Court below, is that the guilty party cause such a claim to be made against the Government, based on the Government's own liability, whether that liability be to the guilty party or some entirely innocent third party.

An excellent example of the application of this rule can be found in *United States v. Lagerbusch*, 361 F.2d 449 (C.A. 3) a case first cited by the Government in the Court below. Mr. Lagerbusch was apparently the recipient of unearned and undeserved payments as the result of false representations (of some undisclosed nature) which he made to his employer. The employer, Hercules Powder Co., was operating under a cost plus contract "under which the United States paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the appellant."* Here, the employee did not personally make a direct claim against the Gov-

*361 F.2d 449.

ernment and the Government was under no liability to him. However, the employee's fraudulent representations caused his employer to make a claim against the Government based on the Government's liability to the employer. The claim made by the employer contained an element of fraud (i.e. the undeserved payments caused by the employee's fraud) and that in turn caused a fraudulent claim to be made against the Government, based on the Government's own liability to the claimant (i.e. the employer). This is analogous to what happened in *Hess*. The contractors made a claim against the local municipalities which in turn made a claim on the Government for the funds it had agreed to supply. Because of the collusive bidding on the part of the contractors, the Government was required to supply a greater amount of money to the local sponsors than it should have. *Hess* was not decided on the basis of claims made by the contractors against the Government, but rather on the basis of claims against the Government which the contractors caused to be made.

The Government argues that *United States v. McNinch*, 356 U.S. 595 can be cited for the proposition that the term "claim" ". . . could be literally construed to embrace any assertion of a 'right or privilege to draw upon the Government's credit,' "[1] and that the principal test applied by the Court to determine whether a "claim" was involved was to de-

[1]Brief For the United States. p. 10.

termine whether or not funds had been disbursed. At page 598-99, the Court said:

> We acknowledge the force in the Government's argument that literally such an application could be regarded as a claim, in the sense that the applicant asserts a right or privilege to draw upon the Government's credit. But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words "claim against the Government" we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions. (citing cases).
>
> In normal usage or understanding an application for credit insurance would hardly be thought of as a "claim against the Government." As the Court of Appeals for the Third Circuit said in this same context, "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." United States v. Tieger (CA3 NJ) 234 F2d 589, 591. In agreeing to insure a home improvement loan the FHA disburses no funds nor does it otherwise suffer immediate financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any.

Clearly, the Court recognized, but rejected, the Government's argument that ". . . the term 'claim' was

not limited to a claim of right to government money . . .'" within the meaning of the False Claims Act. The statement by the Court that the definition of "claim" as found in *United States v. Cohn*, 270 U.S. 339, was relevant further discredits the Government's position in this case.

The argument that *McNinch* determined that a claim was not involved on the ground that no funds were disbursed is likewise refuted by the language of the opinion when read as a whole. Quite clearly, the decision rests on the proposition that an application for credit insurance does not constitute the making of a "claim" against the Government because it does not amount to a demand for the transfer of money or property based on the Government's liability to the claimant.

2. THE LANGUAGE AND HISTORY OF THE FALSE CLAIMS ACT DEMONSTRATE THAT THE COURT BELOW PROPERLY INTERPRETED THE MEANING OF ITS PROVISIONS.

The Petitioner asserts that the term "claim" must be interpreted to include any situation where the Government disburses money or property in order to give effect to the broad purposes Congress had in passing the legislation. As this Court stated in *McNinch*, we are dealing with a criminal statute and this Court

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[9]Ibid.

has decided that broad questions of policy are not to be considered determinative when the issue involves the interpretation of a statute which falls in this category. We here refer the Court to its decision in *McBoyle v. United States*, 283 U.S. 25, which we discussed on pages 10 and 11 of our Brief in Opposition to the Government's Petition For Writ of Certiorari.[9]

However, the rule against broadly interpreting the provisions of criminal statutes is not the only argument against interpreting this Act in the manner the Government has requested. As this Court said in *McNinch*, "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government."[10]

[9]It is a well established principle that where a statute imposes criminal sanctions, as the False Claims Act indeed does, the language of the statute should be required to give fair warning to the public as to what sort of conduct is condemned, and further, that if any ambiguity exists in such a statute, the ambiguity should be construed against the government. In deciding that an airplane did not come within the meaning of the term "motor vehicle" under the provisions of the National Motor Vehicle Theft Act, the eminent Mr. Justice Holmes said:

> ". . . (I)t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."
> **McBoyle v. United States,** 283 U.S. 25 at 27.

[10]356 U. S. 599.

But if the Act applies any time there has been a disbursement of Government funds, as the Petitioner would have us believe, it is difficult to conceive of any kind of fraud that would not be reached by the False Claims Act. Quite obviously, the *McNinch* opinion recognized that the False Claims Act was designed to reach only those frauds which involve a claim against the Government based on the Government's liability to the claimant. As the 9th Circuit said in *United States v. Howell*, 318 F.2d 162 at 165 (C.A. 9), "If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent."

The Petitioner has taken the position that since the purpose of the Act was to stop the "plundering of the public treasury,"[11] the Act should be applied to any conduct or transaction which might have this tendency. In addition to the foregoing arguments, there are two additional reasons why this broad policy argument is not controlling, or perhaps even relevant here.

In the first place the terms of the loan contracts involved here precluded the possibility of the public

[11]Brief For the United States, p. 7.

treasury being plundered.[12] At the time the Government disbursed the loan, it received in return security interests in property which it had determined to be of sufficient value to provide adequate security for the loan. At no point was the public treasury depleted, because it possessed assets which had a value equal to the amount of the loan. The only possible way the treasury could have lost money would have involved a loan default and a discovery that the security was inadequate. Here, none of the loans were defaulted and the Regulations governing the administration of the program placed the responsibility for determining the adequacy of the security directly upon the body administering the program. Thus, not only was the treasury not depleted, it could not have been. In

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[12]The terms of the loan contracts involved in this case can be found at 23 Federal Register 5029 (July 2, 1958). It is to be noted that §474.752 requires that the county committee, or some other person authorized by the CCC, make a determination as to whether a mortgage on the facility alone is sufficient security for the loan. If it is not, the county committee can demand an additional mortgage on a saleable unit of real estate as further security. As additional insurance, §474.727 of the Regulations requires that the constructed facility be inspected by a designated employee of the county committee or the committee itself before the actual disbursement of the loan takes place.

The loans are made for a period of 4 years and the interest rate is 4% per annum on the unpaid balance. The Regulations provide that the contract is to include an acceleration clause and a severance agreement. All liens required as security must be first liens. It is clear that only the gross neglect or incompetence of the county committee could cause the Government to lose any money under agreements such as these, regardless of the percentage of the purchase price of the facility that the Government actually financed.

this sense, the situation is analogous to the situation in *McNinch*, because there, although the Government extended its credit, it suffered no loss to the treasury because the loans were not defaulted. Here, although the Government disbursed loans, it received assets of equal value in return, and since the loans were not defaulted there was never a moment during the entire transaction when the treasury was depleted. This sort of transaction hardly represents the "plundering of the public treasury" that the False Claims Act was designed to reach.

Secondly, the False Claims Act does not contain the same provisions today that it did when originally passed. We are respectfully aware of the statement to the contrary made by this Court in *Rainwater v. United States*, 356 U.S. 590, 592-593.

Originally, R. S. § 3490 provided that any person who was not in the armed forces and who committed any of the acts prohibited by the provisions of R. S. § 5438 would be required to forfeit $2,000.00 plus double the amount of damages which the United States may have sustained by reason of such conduct. Subsequently, R. S. § 3490 was codified at 31 U.S.C. § 231. The provisions of R. S. § 5438 are set out, in part, on pages 2 and 3 of the Petitioner's brief. The statute set forth in the Respondent's brief is that of the 1878 codification of the Revised Statutes. It does

not include all of the provisions that were included in the original Act as passed in 1863 and it must be remembered that Senator Howard's comments were directed toward the 1863 version.[18]

The original version of the False Claims Act was enacted in the third Session of the Thirty-Seventh Congress on March 2, 1863. It is found at 12 Stat. 696-698. The first section of the Act, which described the prohibited conduct, applied only to men in the military. The third section, which eventually became R. S. § 3490, provided that any person not in the military who committeed any of the prohibited acts listed in section one was to forfeit $2,000.00 plus double damages and, in addition be punished by from one to five years imprisonment or by a fine of not less than $1,000.00 and not more than $5,000.00. The statute contained the following pertinent language:

> . . .[A]ny person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, re-

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[18]Referred to in n. 5 on p. 7 of Petitioner's Brief and also set out in **United States v. McNinch**, 356 U. S. 595 at 599.

> ceipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; . . .

The language referring to uttering forged or counterfeited papers did not appear in the statute on December 1, 1873.[14] However, this language which was deleted could be interpreted to impose liability upon the mere use of a forged or counterfeited document without the necessity that it be used in conjunction with the presentation of a claim.[15] Thus, the scope of prohibited conduct in the original Act appears to have been larger than it was in the subsequent versions of the Act.

The 1873 version of the act remained substantially unchanged until 1918. By this time R. S. § 5438 had come to be referred to as Section 35 of the Criminal Code. As a result of the 1918 Amendment, this statute then contained the following language:

> . . . [O]r whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the

[14] 18 Stat. 1060.

[15] Unfortunately, the meager library facilities available to us within the State of Montana are not sufficient to allow us to provide the Court with an explanation as to how and why this language was deleted.

> Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry;"[14]

Clearly, this language would extend the penalties of the statute to anyone who made, used or caused to be made or used any fraudulent or fictitious statement or entry without the requirement that such statement or enry be used in conjunction with, or in support of the making of a claim. The Committee on the Judiciary submitted a report on the amendments to Section 35 which stated that,

> The amendments serve to fully reenact and reinforce the provisions of section 35 of the Criminal Code so that it will include all the offenses heretofore contained therein and an offense against "any corporation in which the United States of America is a Stockholder" either as to the preparation of a false claim, a falsification of statements or representations, the use of any false bill, receipt, voucher, etc., against the United States or any department thereof, or

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[14]40 Stat. 1015-1016.

> any corporation in which the United States is a stockholder, and includes the protection of the uniform and all arms, ammunition, and stores of the Army and Navy of the United States in all its branches and divisions as contained in S. 3470, with amendments as hereinbefore set out . . ."[17]

There is a very serious question as to whether Congress really intended to extend the scope of the Act beyond the making of "false claims against the Government." After the statute as amended was read before the House the following exchange took place:

> The SPEAKER pro tempore. Is there objection to the present consideration of the bill?
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> Mr. GREEN of Iowa. Mr. Speaker, reserving the right to object, unless there is some one who can give some explanation of this bill, I shall object to it, because it seems to me to be very awkwardly worded.
>
> Mr. IGOE. Mr. Speaker, the chairman of the committee is not present, but the only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder, and also the punishment of the disposal of the property belonging to the Army or Navy and pledging it or selling it or disposing of it wrongfully."[18]

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[17] H. R. Rep. No. 668, 65th Cong., 2d Sess. 2 (1917-1918).

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[18] 56 Cong. Rec. 11118 (1918).

The language of the Act and the Report from the Judiciary Committee obviously indicate that Mr. Igoe was understating the effect of the amendment and that the penalty of the statute was extended to making false statements and was no longer limited to false claims.

The language added by the 1918 amendment has persisted to the present. In 1948, the provisions of the criminal section of the False Claims Act were divided into two separate sections.[19] These provisions are now found at 18 U.S.C. § 287[20] and 18 U.S.C. § 1001.[21] § 287 deals with false claims and § 1001 deals with false statements. It is also to be noted that the

[19] 62 Stat. 749 and 698.

[20] 18 U.S.C. § 287:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fradulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[21] 18 U.S.C. §1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fradulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

provisions of 15 U.S.C. § 714m (a)[7] which was involved in the *Sell* case and which Neifert-White was charged with violating in the criminal action brought against it[8] are very similar to those found in § 1001.

The civil provisions of the False Claims Act were codified at 31 U.S.C. § 231.[9] Unlike R. S. § 3490 the present statute does not refer to the criminal provisions of the Act but rather, specifically describes the sort of conduct that will result in civil liability. The present Act contains no reference to false statements and deals exclusively with false claims. Quite clearly, the criminal sections of the False Claims Act cover every situation which the Government now urges that the civil section covers. If this were the case, then why does the criminal section refer to both false claims and false statements while the civil section deals only with false claims? Likewise, if the Government is so convinced that a claim is involved here why did it not charge Respondent with a violation of 18 U.S.C. § 287 in the criminal action instead of 15 U.S.C. § 714m (a)? If we are to accept the Government's argument, we must also accept its necessary implication, and that is that the term "claim" means one thing in the criminal section and something entirely different in the civil section.

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[7] See n. 3 on p. 10 herein.

[8] Criminal No. 3940, U. S. District Court for the District of Montana, Helena Division.

Petitioner brings this complaint under the provisions of 31 U.S.C. § 231, 232.[a] The complaint alleges that the Respondent submitted false invoices in support of an application for a loan. This may constitute the making of a false statement, but it does not constitute participation in the making of a false claim. 31 U.S.C. § 231 does not impose liability upon persons making false statements. There was no claim involved here and unless there is a claim as defined by this Court in *Cohn*, there can be no liability under the False Claims Act.

Finally, the Government asserts that if the interpretation of the court below is allowed to stand, the application of the statute will lead to absurd results. It should be pointed out that these "absurd results" would be the product of inconsistent legislation rather than the uniform application of the statute. Thus, if Congress desires one of its programs to come under the False Claims Act, it should either draft its legislation to accommodate the provisions of the Act or amend the Act to accommodate the provisions of the proposed legislation. In either event, it is a matter for Congress to remedy, not the courts. The Respondent is not urging a novel application of the Act nor is it propounding a unique definition of the term "claim." Indeed, such conduct is descriptive only of the Government's position.

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[a] A. 2.

The Government argues throughout its brief that the decision below will open the doors to widesrpead abuse of present Government programs. This argument totally ignores the broadly defined criminal statutes* which cover false statements in addition to false claims and provide for penalties of five years and or $10,000.00 fine for each count. Interestingly enough, the Government did not ignore the criminal acts when it proceeded against Respondent criminally prior to the filing of this present action.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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*18 U.S.C. §287; 18 U.S.C. §1001 and 15 U.S.C. §714m (a).

SUPREME COURT, U. S.
JAN 3 1968

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends that this case does not come within the purpose of the False Claims Act because the false statements were made in connection with applications for loans which were required by regulation to be adequately secured. Therefore, the argument runs, no possibility of loss to the government was involved. It is, of course, irrelevant that no measurable loss was sustained; it has long been recognized that the provision in the False Claims Act for a liquidated sum for each false claim, in addition

to recovery of double the provable damages, was designed to insure recovery even in the absence of provable damages. See, *e.g.*, *Rex Trailer* v. *United States*, 350 U.S. 148, 152-3 n. 5; *United States* v. *Ridglea State Bank*, 357 F. 2d 495, 499 (C.A. 5); *Toepleman* v. *United States*, 263 F. 2d 697, 698-9 (C.A. 4), certiorari denied *sub nom. Cato Bros.* v. *United States*, 359 U.S. 989. Nor is it correct to say that a loan obtained by a false statement involves none of the potentiality of loss against which the False Claims Act was designed to afford protection. Here, the false statements in the loan applications as to the purchase price of the assets which were to serve as security for the loans were intended to cause the government to overvalue the security. Moreover a false statement which results in the making of a loan for a sum greater than the amount that could be granted if the true facts were known does result in at least a temporary loss, since the government moneys are applied to unauthorized uses. Even in the case of a loan which is repaid, the borrower has received a subsidy where, as here, the interest rate is below the rate which would be charged in the open market.[1]

We also note that the claim-of-right doctrine laid down by the court below has no relation to the risk of loss to which a false statement subjects the government. The risk of loss resulting from fraud in a loan application would depend on the borrower's solvency,

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[1] Under the then-existing regulations, the interest charged was four per cent per annum. Section 474.726(c), 23 F.R. 9688. Commercial lending rates would doubtless have been higher. Federal Reserve Bulletin (January, 1960), at 49.

the adequacy of the security, and the rate of interest. However, the rule established by the court below would make the False Claims Act inapplicable to any loan application—even if there was in fact no existing security. Furthermore, the approach adopted by the court below is not limited to loans: it would also apply to the many federal subsidy programs where the grant is a matter of administrative discretion rather than legal right. Obviously, the grant of a subsidy to an ineligible recipient, or in an unauthorized amount, causes loss to the government: grant-in-aid funds—whether or not the recipients of the grants have a legal claim—"are as much in need of protection from fraudulent claims as any other federal money." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544.

2. Respondent refers to the fact that criminal statutes proscribe both false "claims" (18 U.S.C. 287) and false "statements" (18 U.S.C. 1001), and implies that the government's position here would obliterate the statutory distinction between "claims" and "statements". However, there are countless "statements" made to government agencies which are not "claims" within the civil provisions of the False Claims Act, either because they do not call for immediate transfer of government funds or property (such as an application for a loan guaranty),[2] or because the government's only interest is regulatory in na-

[2] *United States* v. *McNinch*, 356 U.S. 595, held an application for FHA credit insurance not to be a "claim" under the civil provisions of the False Claims Act.

ture.[3] Thus, there are numerous cases applying 18 U.S.C. 1001 to false "statements" which are clearly not "claims": *United States* v. *Gilliland*, 312 U.S. 86 (reports under "Hot Oil" Act regarding production and handling of petroleum products); *United States* v. *Zavala*, 139 F. 2d 830 (C.A. 2) (customs declaration); *United States* v. *Leviton*, 193 F. 2d 848 (C.A. 2), certiorari denied, 343 U.S. 946 (shipper's export declaration); *United States* v. *Wright*, 48 F. Supp. 687 (D. Del.) (application for ration book); *United States* v. *Goldsmith*, 108 F. 2d 917 (C.A. 2), certiorari denied, 309 U.S. 678 (application for immigration visa); *Cohen* v. *United States*, 201 F. 2d 386 (C.A. 9), certiorari denied, 345 U.S. 951 (taxpayer's financial statement submitted in course of investigation of income tax liability); *Blake* v. *United States*, 323 F. 2d 245 (C.A. 8) (application for federal employment); *United States* v. *Salazar*, 293 F. 2d 442 (C.A. 2) (signing false name to civil service examination); *Frasier* v. *United States*, 267 F. 2d 62 (C.A. 1) (statement in Armed Forces Loyalty Certificate); *United States* v. *Van Valkenburg*, 157 F. Supp. 599 (D. Alaska) (statement made to United States Attorney to induce action against a third person).

Clearly, then, recognition that the False Claims Act reaches every claim for immediate transfer of gov-

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[3] *United States* v. *Gilliland*, 312 U.S. 86, held that the proscription of false "statements", now set forth in 18 U.S.C. 1001, applies where the government's sole interest is regulatory, specifically rejecting the argument that it applies only "to matters in which the Government has some financial or proprietary interest." 312 U.S. at 91.

ernment money or property leaves untouched by the Act innumerable frauds on the government. There is accordingly no inconsistency with this Court's statement "that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States* v. *McNinch*, 356 U.S. 595, 599.

3. Respondent's discussion of the various changes in the False Claims Act since its original passage (Brief, pp. 20-26) adds nothing to the case. The 1873 revision made no change pertinent here, and does not detract from the relevance of the legislative history of the original Act.[4] Nor is respondent's discussion (Brief, pp. 22-25) of the 1918 amendment to the criminal provisions of the False Claims Act, and

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[4] As respondent notes, Section 5438 of the 1873 Revised Statutes eliminated the original provision forbidding the forgery of any signature on any bill, receipt, voucher, etc. However, this provision had applied in the original Act only where the forgery was in connection with a "false, fraudulent, or fictitious claim." 12 Stat. 697. Thus, whatever the purpose of the change, it did not affect the original requirement that there be a "claim." The Chairman of the House Committee on the Revision of the Laws stated to the House that in the 1873 revision "the committee have endeavored to have this revision a perfect reflex of the existing national statutes": in response to a question from the floor "whether there will be anything in this revision of the laws that we have not already in the Statutes at Large?", the Chairman answered "Nothing; at least we do not intend there shall be." 2 Cong. Rec. 129 (Rep. Poland) (December 10, 1873). The revisers may well have thought that the eliminated provision came within the second clause of Section 5438, proscribing the making or using, in connection with a false claim, of any false bill, receipt, voucher, etc., knowing it to contain "any fraudulent or fictitious statement or entry."

the 1948 codification of these provisions, relevant here. As this Court recognized in *Rainwater* v. *United States*, 356 U.S. 590, 592-3, the civil provision of the False Claims Act incorporates the criminal provisions as set out in the 1878 Revised Statutes; subsequent amendments are irrelevant.

Respectfully submitted.

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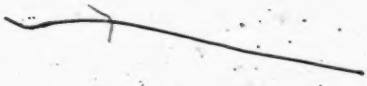

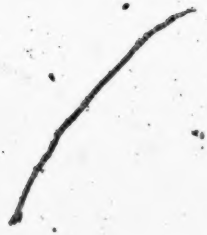

SUPREME COURT OF THE UNITED STATES

No. 267.—October Term, 1967.

United States, Petitioner, v. Neifert-White Company.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 5, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

This is an action by the United States to recover statutory forfeitures under the False Claims Act.[1] The

[1] In relevant part, the statute provides as follows:

R. S. § 3490 (1874):

"Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act . . . ."

R. S. § 5438 (1874):

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

The criminal aspect of this statutory scheme has been altered and codified in 18 U. S. C. § 287 and 18 U. S. C. § 1001, see n. 2,

question is whether the Act applies to the supplying of false information in support of an application to a federal agency, the Commodity Credit Corporation (CCC), for a loan. The District Court dismissed the action on the ground that an application for a CCC loan, as distinguished from a claim for payment of an obligation owed by the Government, is not a "claim" within the meaning of the Act. The Court of Appeals for the Ninth Circuit affirmed. We granted certiorari. 389 U. S. 814 (1967).

The CCC is authorized to make loans to grain growers to finance the construction or purchase of storage facilities. 15 U. S. C. § 714b (h). Pursuant to its authority under statute, 15 U. S. C. § 714b (d), the CCC has adopted regulations providing for the granting of loans in amounts not to exceed 80% of the actual purchase price of storage bins. A grain grower who desires to apply for a loan is required to support his application by an invoice showing the purchase price and the amount of the down payment made by him. 23 Fed. Reg. 9687.

Since the Government's complaint was dismissed for failure to state a cause of action, the allegations of the complaint must be taken as true for present purposes. According to the complaint, respondent is a dealer in grain storage bins. In 1959, in selling bins to 12 grain farmers, one of respondent's officers prepared invoices in which the purchase price was deliberately overstated. The purpose was fraudulently to induce the CCC to extend loans to respondent's customers in amounts exceeding 80% of the actual purchase price. The invoices were submitted to the CCC along with the loan applications, and the agency relied on the overstated purchase

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infra. The civil (forfeiture) provisions have been codified, unaltered, in 31 U. S. C. § 231, but the above-cited version of these provisions continues to be the official one. The above-quoted provisions survive only insofar as civil liability is concerned.

price in determining the amount of loans that were subsequently made. The United States claims the statutory forfeiture of $2,000 for each of the 12 alleged violations of the Act.

The issue in this case is narrow and precise: Does the False Claims Act reach "claims" for favorable action by the Government upon applications for loans or is it confined to "claims" for payments due and owing from the Government?[2] It is respondent's position that the term "claims" in the Act must be read in its narrow sense to include only a demand based upon the Government's liability to the claimant. Respondent relies upon *United States* v. *Cohn*, 270 U. S. 339 (1926), and *United States* v. *McNinch*, 356 U. S. 595 (1958), to support this narrow reading.

Cohn involved a criminal proceeding under an earlier version of the present False Claims Act.[3] It concerned a fraudulent application to obtain the release of merchandise which did not belong to the United States and which was being held by the customs authorities as bailee only.

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[2] No other issue is presented. The statute expressly reaches persons who falsify a "receipt" "for the purpose of . . . aiding to obtain the payment or approval of [a] claim." See n. 1, *supra*.

[3] See n. 1, *supra*. The criminal aspect of the original False Claims Act has been carried forward in two separate criminal statutes currently in force. Section 287 of Title 18 makes it a crime for a person to present "any claim upon or against the United States or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."

Section 1001 of the same title subjects to criminal penalties "whoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry."

Respondent has been indicted under still another criminal statute, 15 U. S. C. § 714m (a), which prohibits the making of false statements for the purpose of influencing the CCC.

The case did not involve an attempt, by fraud, to cause the Government to part with its money or property, either in discharge of an obligation or in response to an application for discretionary action. The language in the Court's opinion upon which respondent relies cannot be taken as a decision upon a point which the facts of the case did not present.[4]

In *McNinch*, the Government brought suit for damages and forfeitures under the False Claims Act, in its present form, against persons who had filed fraudulent applications for home-modernization loans with a private bank which was regularly insured by the Federal Housing Administration against losses on such loans. The bank granted the loans sought by defendants, which were "routinely" insured by the FHA. 356 U. S., at 597, n. 4. This Court held that since FHA "disburses no funds nor does it otherwise suffer immediate financial detriment," *id.*, at 594, the transaction was not within the ambit of the False Claims Act. The Court emphasized the distinction between contracts of insurance against loss such as those involved in *McNinch*, and transactions in which the United States pays or lends money. For purposes of the present case, we need not reconsider the validity of this distinction. It is sufficient to note that the instant case involves a false statement made with the purpose and effect of inducing the Government immediately to part with money.

The precise question presented by this case has never been considered by the Court. However, both the his-

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[4] [I]t is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" 270 U. S., at 345-346. (Emphasis added.)

tory and the language of the False Claims Act, as well as the thrust of our prior decisions, indicate the answer to our present inquiry. The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.[5] In its present form the Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, or who makes a false "bill, receipt, . . . claim, . . . affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval of" such a false claim. In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.[6] See, *e. g.*, *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943).

On the very day that this Court decided *McNinch*, it also decided three cases holding that a fraudulent application for a loan submitted to the CCC was a claim against the Government of the United States, within the meaning of the False Claims Act.[7] The question debated in those cases was not the meaning of the word "claim," but whether the CCC, a wholly owned government corporation, was "the government of the United States, or any department or officer thereof" within the meaning of the statute. In the course of its opinion on this mat-

[5] See Cong. Globe, 37th Cong., 3d Sess., 952–958.

[6] See n. 2, *supra*.

[7] The principal case was *Rainwater* v. *United States*, 356 U. S. 590 (1958). Reference was made to the other two cases, *Cato* v. *United States* and *Toepleman* v. *United States*, in the course of the opinion in *McNinch*.

ter, the Court noted that the objective of Congress in enacting the False Claims Act "was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made" and that "by any ordinary standard the language of the Act is certainly comprehensive enough to achieve that purpose." *Rainwater* v. *United States*, 356 U. S. 590, 592 (1958).

Analogous reasoning leads us to hold today that the False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond "claims" which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. We believe the term "claim," as used in the statute, is broad enough to reach the conduct alleged by the Government in its complaint. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings in accordance with this opinion.

Reversed and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.